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No. 80-5887

In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD H. WHITE,

Petitioner,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 10, 1980.
CERTIORARI GRANTED MAY 18, 1981.

JOINT APPENDIX

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

C. 76-71

CLASS ACTION (granted 5/11/76)

RICHARD H. WHITE,
individually and on behalf of
all others similarly situated

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY; BENJAMIN C. ADAMS, COMMISSIONER OF THE DEPARTMENT OF EMPLOYMENT SECURITY,* in his official capacity

RELEVANT DOCKET ENTRIES

1.	Motion for Leave to Proceed In Forma Pauperis ("motion allowed", 3/8/76, Caffrey, J.)	Mar. 4, 1976
2.	Complaint for Declaratory and Injunctive Relief (Raymond J. Kelly, Esq., NHLA, Manchester; George C. Bruno, NHLA, Manchester)	Mar. 8, 1976
5.	Plaintiff's Motion for Temporary Relief and Immediate Hearing	Mar. 18, 1976
8.	Defendants' Objection to Plaintiff's Motion for Temporary Relief and Immediate Hearing	Mar. 26, 1976
9.	Plaintiff's Motion to Certify the Class Action (Granted. See Order)	Mar. 29, 1976
21.	Defendant's Objection to Motion for Temporary Restraining Order	Apr. 27, 1976

* Dismissed individually 5/11/76.

RELEVANT DOCKET ENTRIES

27.	Defendant's Objection to Plaintiff's Motion to Certify the Class Action	May 3, 1976
28.	Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss, Objection to Class Certification, and Interrogatories	May 4, 1976
43.	Order, Bownes, J. (re pending motions)	May 11, 1976
45.	Defendants' Answer	May 24, 1976
46.	Plaintiffs' Motion to Compel Answers to Interrogatories (Granted, Barry, Mag. Rule 11 7/13/76)	July 2, 1976
47.	Defendant, Adams, Commissioner, Motion to Remove default granting Plaintiff's Motion to Compel Answers to Interrogatories (Granted, Barry, Mag. 7/20/76 See Pretrial Order 7/20/76)	July 16, 1976
48.	Pretrial Order, Barry, Mag. (re dis. 11/1/76; 11/15/76)	July 20, 1976
51.	Plaintiffs' Motion to Compel Answers to Interrogatories (Granted)	Aug. 17, 1976
57.	Report of Pretrial, Barry, Mag.	Sept. 13, 1976
60.	Plaintiffs' Proposed Guidelines for Redetermination of Eligibility for Unemployment Compensation Benefits After a Previous Period of Disqualification has Elapsed	Sept. 22, 1976
61.	Report of Hearing, Barry, Mag. (re all pending motions)	Oct. 1, 1976
66.	Order, Barry, Mag. (re dis. 4/4/77; 4/14/77)	Mar. 11, 1977
75.	Order, Bownes, J. (re final pretrial)	Apr. 21, 1977

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81.	Stipulation of Facts	May 16, 1977
82.	Plaintiff's Proposed Stipulation of Facts	May 18, 1977
83.	Defendants' Amended Answers to Admission of Facts	May 18, 1977
84.	Defendants' Objection to Plaintiff's Proposed Stipulation of Facts	May 31, 1977
85.	Plaintiffs' Pretrial Materials	June 3, 1977
86.	Plaintiffs' Pretrial Memorandum of Law-Preliminary Statement	June 6, 1977
87.	Defendant's Memorandum of Law	June 6, 1977
88.	Defendant's List of Contested Issues of Fact	June 6, 1977
89.	Defendant's List of Contested Issues of Law	June 6, 1977
90.	Defendant's List of Exhibits	June 6, 1977
91.	Stipulations Pertinent Applicable Law	June 6, 1977
94.	Final Pretrial Order, Bownes, J.	Aug. 19, 1977
128½.	Order, Bownes, J.	Oct. 14, 1977
131.	Plaintiffs' Post-Trial Memo	Oct. 26, 1977
132.	Defendant's Post-Trial Memo	Oct. 28, 1977
133.	Opinion, Bownes, J. by Designation	Nov. 15, 1977
134.	Judgment	Nov. 15, 1977
142.	Order, Bownes, J. (re Amendment of Order dated 11/15/77)	Dec. 16, 1977
143.	Defendants' Notice of Appeal	Dec. 27, 1977
146.	Court Reporters Transcript of Trial 10/12/77—Vol. I	July 26, 1978
147.	Court Reporters Transcript of Trial 10/13/77—Vol. II	July 26, 1978

RELEVANT DOCKET ENTRIES

148.	Mandate, CCA, entered 12/11/78, remanded for entertaining a consent decree	Dec. 12, 1978
149.	Consent Decree, Devine J.	Jan. 26, 1979
150.	Judgment, Barry, Clerk	Jan. 26, 1979
152.	Plaintiff's Motion for Attorney's Fees (See Order, Loughlin, J., 8/30/79)	June 7, 1979
153.	Defendant's Objection to Motion for Attorneys Fees	June 18, 1979
154.	Plaintiff's Replication to Defendants' Objection to Motion for Attorneys' Fees	July 6, 1979
155.	Plaintiffs' Itemized Bill in Support of Motion for Attorneys' Fees	Aug. 14, 1979
156.	Plaintiffs' Memo of Law in Support of Attorneys Fees	Aug. 20, 1979
157.	Defendants' Memo of Law in Support of its Objection to Plaintiff's Request for Attorneys' Fees	Aug. 28, 1979
158.	Court's Ruling on Motion for Attorneys' Fees, Loughlin, J. (granted)	Aug. 30, 1979
159.	Defendant's Motion to Vacate Consent Decree (See Order, Loughlin, J., 10/1/79)	Sept. 13, 1979
160.	Plaintiffs' Objection to Motion to Vacate Consent Decree	Sept. 21, 1979
161.	Defendant's Notice of Appeal	Sept. 28, 1979
162.	Order on Motion to Vacate Consent Decree, Loughlin, J. (motion denied)	Oct. 1, 1979
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. C76-71

RICHARD H. WHITE,
individually and on behalf of
all others similarly situated, PLAINTIFF

vs.

THE NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY and BENJAMIN C. ADAMS, Commissioner of the Department of Employment Security, individually and in his official capacity, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF—Filed March 4, 1976

PRELIMINARY STATEMENT

Plaintiff, individually and on behalf of all other unemployed workers in the State of New Hampshire similarly situated, brings this suit to challenge several aspects of the New Hampshire Department of Employment Security's (hereinafter DES) unemployment compensation procedures. Plaintiff challenges New Hampshire's practice and policy of failing to recertify claimants for unemployment compensation benefits when periods of disqualification have expired. The defendants DES and Adams have a policy in situations where a claimant is in continued claims filing status, R.S.A. 282:5-B(1) *et. seq.*, of ignoring the cessation of disqualification periods. The failure of DES to reopen claims and make a determination on continued eligibility or a reopened claim in a timely fashion violates the federal mandate that eligibility for benefits be determined "to insure full payment of unemployment compensation when due". Plaintiff

maintains that this practice and policy of failing to render or implement timely redeterminations of eligibility denies him due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiff also challenges the failure of DES to redetermine eligibility for benefits when an appeal is pending in state court on a prior issue of disqualification for benefits. This failure to redetermine eligibility in a timely fashion contravenes the Social Security Act requirement that benefits be paid "when due", 42 U.S.C. § 503(a)(1).

In addition to final declaratory and injunctive relief, plaintiff seeks a preliminary injunction ordering the immediate determination of his eligibility for unemployment benefits pending a determination on the merits of his statutory and constitutional claims.

II. JURISDICTION

1. Jurisdiction is conferred by 28 U.S.C. § 1343(3), (4) which provides for original jurisdiction of this Court in all suits authorized by 42 U.S.C. § 1983 to redress the deprivation under color of state law or regulation or customary usage of any right, privilege or immunity security by the Constitution of the United States or by an Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States.

2. Plaintiff's action for declaratory and injunctive relief is authorized by:

a. 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure which relate to declaratory judgments;

b. 42 U.S.C. § 1983, which provides for the redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and the laws of the United States.

3. Each and every act of defendants here complained of has subjected and will subject the plaintiff and members of his class to the deprivation of their rights, privileges and immunities secured by the due process clause of the Constitution of the United States.

4. Pendent jurisdiction is invoked on the issue of state law as it relates to the redetermination of unemployment compensation benefits under R.S.A. 282:5-B(2)(d).

III. PLAINTIFF

1. The named plaintiff, Richard H. White, is a citizen of the United States, 52 years old and a resident of Keene, New Hampshire. Mr. White applied for unemployment compensation benefits on March 17, 1975, and was denied by a certifying officer on April 3, 1975. As a result of an Appeal Tribunal decision on May 16, 1975, upholding the certifying officer's disqualification for 26 weeks for voluntary quit, Mr. White was declared ineligible by the Department for benefits until September 13, 1975. Although Mr. White requested that his claim be reopened on or about October 1, 1975, no action has yet been taken by the Department of Employment Security; it has been five months since the redetermination of eligibility became "due".

2. Plaintiff sues on behalf of himself, pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, and on behalf of all others similarly situated. The class represented by the plaintiff is so numerous that joinder of all its members is impracticable. This class consists of all unemployed persons in the State of New Hampshire whose requests for a redetermination of eligibility after an initial disqualification have not been acted upon in a timely manner after a previous disqualification has expired. There are questions of law and fact common to the class. Plaintiff's claims are typical of the claims of the class, and the plaintiff will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class

as a whole, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

IV. DEFENDANTS

1. Defendant Benjamin C. Adams is the Commissioner of the Department of Employment Security, and in that capacity is responsible for the overall administration of that Department.

2. Defendant New Hampshire Department of Employment Security is the agency in the State of New Hampshire responsible for the administration of the unemployment compensation program which directly affects the rights of the plaintiff in the above-entitled case and members of his class.

V. FACTUAL ALLEGATIONS

1. In order to receive federal funds for the administration of the Unemployment Insurance Program in the State of New Hampshire, defendants have been required by the federal government to formulate a state plan for unemployment compensation consistent with the provisions of 42 U.S.C. § 501 *et. seq.* Title 42 U.S.C. § 503, with which such "state plan" must conform, provides in relevant part:

> (a) The Secretary of Labor shall make no certification of payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for:
>
> > (1) Such methods of administration . . . as are . . . reasonably calculated to insure full payment of unemployment compensation *when due*. . . . [Emphasis added.]

2. Under the New Hampshire Unemployment Compensation Statute, R.S.A. 282:5 *et. seq.*, an initial de-

termination of eligibility is made when an unemployed claimant files an initiating claim and a claim examiner determines, pursuant to R.S.A. 282:5-B(2), that the claim is valid.

3. The statutory provisions relating to the determination of continued eligibility for benefits provides in relevant part, as follows:

> R.S.A. 282:5-B(2)(d):
>
> . . . a determination shall be made by a certifying officer on any claim for benefits, though not an initial claim, where, in his judgment, there appears to be an issue relative to the entitlement of the claimant to benefits. The determination shall be in a manner provided in (c) immediately above and the interested parties shall be notified in the same manner. . . .

4. After an initial determination of eligibility or ineligibility is made by the defendant, his agents or employees, the claimant customarily reports weekly at his local Department of Employment Security office to sign up for additional benefits.

5. Plaintiff White filed a valid initiating claim for unemployment benefits on or about March 17, 1975, and was declared ineligible for benefits by the certifying officer of the Keene district office of DES on April 3, 1975. (See attached Appendix A.)

6. On April 3, 1975, plaintiff appealed the denial of his unemployment benefits and a hearing was held on May 8, 1975, before the Appeal Tribunal pursuant to R.S.A. 282:5-C *et. seq.* By a decision of the Appeal Tribunal dated May 16, 1975 (see attached Appendix B), the claimant was found ineligible for benefits on the grounds that:

> . . . the claimant left his employment voluntarily without good cause attributable to his employer on March 14, 1975. Benefits are disallowed from March

14, 1975, and until wages from employment are earned in each of the three weeks. . . .

. . . This work and earnings requirement shall not be required following the 26 weeks subsequent to the end of the week in which the above separation occurred.

7. The determination of the Appeal Tribunal was appealed by the plaintiff to Superior Court on June 24, 1975. See *Richard H. White* v. *Benjamin Adams, Commissioner, et. al.* (Cheshire County Superior Court, Equity No. 12312). This appeal for benefits from March to September 13, 1975, is still pending in the Cheshire County Superior Court. Upon information and belief and upon the experience of the plaintiff and his counsel, as more fully alleged hereinafter, the defendants have a policy of failing to redetermine eligibility for benefits of a claimant in a continued claim filing status because of the pendency of a state court appeal on a previous disqualification.

8. From March 17, 1975, to the present date, the plaintiff has filed claims for unemployment benefits at all proper times and in accordance with the regulations of the defendants. He has sought employment in his former occupation as a salesman. He has looked for work as a cook, bartender, truck driver, yet with no success.

9. Plaintiff's 26-week disqualification expired on September 13, 1975 (see attached Appendix C, Determination of Claims Representative—Fact Finding Report dated March 25, 1975). The Fact Finding Report by the Claims Representative, S. Field, which was approved by Paul Craig, certifying officer, dated March 31, 1975, shows a notation that a voluntary quit disqualification existed for the period March 14, 1975, to September 13, 1975, only.

10. Plaintiff White filed valid continuing claims for the months of September, October, November and Decem-

ber of 1975, and January and February of this year. Although his 26-week disqualification expired on September 13, 1975, no action has been taken by the Keene District Office of the Department of Employment Security or the main office of the defendant in Concord.* Although five months have elapsed since plaintiff's eligibility for continued benefits should have been determined, no action has been taken by the defendant Department of Employment Security or any of its employees to redetermine his eligibility for benefits.

11. Plaintiff has requested on numerous occasions from September 13, 1975, to the present date that his claim for eligibility for unemployment compensation benefits be redetermined. In fact, plaintiff has been asked by claims examiners of the defendants whether he "has received any of his checks yet". No action has been taken on this request for a redetermination pursuant to R.S.A. 282:5-B(2)(d). Plaintiff, through his counsel, has contacted counsel for the Department of Employment Security (see attached Appendix D) requesting that this long overdue determination of eligibility be processed and completed expeditiously. No response has been received to this request. Upon information and belief the intolerable delay experienced by Mr. White in having his claim for benefits reopened is not an isolated incident for hundreds of workers in New Hampshire when they seek unemployment compensation benefits after a period of disqualification, face the same delays.

12. As of the date of this complaint, no action has been taken by the Department of Employment Security, although five months have elapsed since claimant's eligibility for unemployment benefits became "due" again. The continued arbitrary refusal of the defendants to redetermine a claimant's entitlement to benefits when such a determination becomes "due" under state law

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*Plaintiff's entire file is presently in the main office of the defendant Department in the General Counsel's office where no action on redetermination can be undertaken.

R.S.A. 282:5-B(2)(d) and federal law 42 U.S.C. § 503 (a)(1), operates to deprive him of his benefits in such a capricious manner as to violate fundamental fairness required by the due process clause of the Fourteenth Amendment.

13. Pursuant to 42 U.S.C. § 503(a)(1) of the Social Security Act, a claimant for unemployment benefits has a federally protected right to a determination of his entitlement to unemployment benefits when those benefits "become" due. The arbitrary and capricious actions of the defendants and their agents in denying Mr. White a redetermination of his eligibility for benefits pursuant to R.S.A. 282:5-B(2)(d) has effectively deprived said claimant of his rights pursuant to state statute and those guaranteed him by the "when due" clause of the Social Security Act, 42 U.S.C. § 503(a)(1).

14. The arbitrary and capricious refusal of DES, its agents and employees to make a redetermination on the continued eligibility of Mr. White has caused the plaintiff and his family to fall into a constantly recurring pattern of debt and financial distress through no fault of their own. (See attached Financial Affidavit.)

VI. FIRST CAUSE OF ACTION

For a first cause of action, plaintiff alleges that his right to a redetermination of his eligibility for unemployment benefits pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution has been violated by the arbitrary and capricious acts of the defendant DES's failure to redetermine and reopen his unemployment claim pursuant to R.S.A. 282:5-B(2)(d).

VII. SECOND CAUSE OF ACTION

For a second cause of action, plaintiff alleges that the failure of the certifying officer and/or other employees of the defendant to make a determination "on any claim for benefits, though not an initial claim" pursuant to

R.S.A. 282:5-B(2)(d) operates to deprive the plaintiff of his right to a determination on his eligibility for benefits "when due" pursuant to the Social Security Act, 42 U.S.C. § 503(a)(1).

VIII. THIRD CAUSE OF ACTION

For a third cause of action, plaintiff alleges as a pendent state claim that the failure of the defendant Department of Employment Security and their agents to initiate a redetermination of eligibility for benefits by a certifying officer violates the state statutory mandate of R.S.A. 282:5-B(2)(d). That statute requires "the determination shall be in the manner provided in (c) immediately above and the interested parties shall be notified in the same manner."

IX. PRAYER FOR RELIEF

Wherefore, plaintiff respectfully prays on behalf of himself and all other persons similarly situated, that this honorable Court:

1. Assume jurisdiction of this cause and set this case down promptly for a hearing on temporary and permanent relief.

2. Determine by order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure that this action be maintained as a class action on behalf of all unemployed workers whose claims for unemployment benefits have not been reopened pursuant to R.S.A. 282:5-B(2)(d) after initial periods of ineligibility have expired.

3. Enter a preliminary injunction enjoining DES from failing to promptly determine within five days the reopened claim for unemployment compensation benefits pending without decision since September 14, 1975.

4. Enter a permanent injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the defendant, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to grant plaintiff

and all other persons similarly situated prompt redetermination of eligibility for unemployment benefits when previous periods of ineligibility have expired pursuant to R.S.A. 282:5-B(2)(d) and 42 U.S.C. § 503(a)(1) of the Social Security Act.

5. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 54, 57 and 58 of the Federal Rules of Civil Procedure declaring the following:

a. That defendants' regulatory and administrative scheme, insofar as it fails to provide a redetermination of eligibility for unemployment benefits within the statutory mandate of R.S.A. 282:5-B(2)(d), deprives unemployment claimants of their rights to a fair, timely and proper administrative action as required by the due process clause of the Fourteenth Amendment to the United States Constitution.

b. That defendants' administrative scheme creates unjustifiable and arbitrary delays in the redetermination of eligibility for unemployment compensation benefits, and that an otherwise eligible claimant for unemployment benefits is thereby deprived of said benefits, so as to violate his rights to a determination "when due" of his claim for unemployment compensation benefits pursuant to 42 U.S.C. § 503(a)(1) of the Social Security Act.

6. Order the defendants, their successors in office, agents and employees, to notify promptly by first class mail, all persons whose claim for redetermination of eligibility has been pending more than fourteen (14) days that they are now eligible for such benefits and may reopen their claim.

7. Order the defendants, their successors in office, agents and employees to promulgate regulations within thirty days of judgment that will require all pending unemployment compensation claims to be acted upon within fourteen days after a previous period of disqualification has expired.

8. For such other and further relief as may be equitable and just.

Respectfully submitted,

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March 3, 1976

VERIFICATION

STATE OF NEW HAMPSHIRE
CHESHIRE, SS.

RICHARD H. WHITE, being first duly sworn, deposes and says:

That he resides at 96 Adams Street; Keene, New Hampshire;

That he is the plaintiff in the above-entitled action;

That he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes them to be true.

/s/ Richard H. White
RICHARD H. WHITE
Plaintiff

ACKNOWLEDGEMENT

STATE OF NEW HAMPSHIRE
CHESHIRE, SS.

On February 27, 1976, before me, the undersigned, a Justice of the Peace in the County of Cheshire, State of New Hampshire, personally appeared RICHARD H. WHITE, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

/s/ Rosemary Davis
ROSEMARY DAVIS
Justice of the Peace

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE,
individually and on behalf of all others
similarly situated

v.

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL.

OPINION—November 15, 1977

The issue in this class action is whether the defendants' procedure in processing new claims of persons who have previously been denied unemployment compensation payments and have appealed such denial to the state courts violates the "when due" provision of the unemployment compensation section of the Social Security Act, 42 U.S.C. § 503(a)(1) and/or the Due Process Clause of the Fourteenth Amendment.

The action is brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4). Plaintiffs also seek declaratory and injunctive relief pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure.

On May 11, 1976, I granted the plaintiffs' motion to certify the case as a class action and defined the class as all present and future applicants for unemployment compensation benefits whose initial claims for benefits were denied or may be denied and whose period of disability expired or will expire prior to the filing of their renewed claim.

The underlying facts as to the procedure followed have been stipulated. I adopt the stipulations filed with slight modifications in paragraphs 2, 5, 8, 9, 10, and 16.

1. Unemployment compensation benefits paid pursuant to NH RSA 282 in New Hampshire are paid entirely out of a fund maintained by contributions paid by employers in New Hampshire. Special federal unemployment program benefits such as Supplemental Unemployment Assistance and benefits for ex-servicemen (UCX) are fully reimbursed by the federal government.

2. The common factor in this action that distinguishes the plaintiff class from other persons who file for unemployment compensation are that they have been found ineligible for benefits at some point while they were filing claims and have an appeal pending from that denial of benefits to the New Hampshire courts pursuant to NH RSA 282:5-G which provides:

> Any interested party aggrieved by any decision of an appeal tribunal in proceedings under this chapter may, within fifteen days after the date of mailing of such decision, appeal therefrom to the superior court in the manner provided in paragraph (3) of this subsection.

3. An initial claim as defined by NH RSA 282:5-B(1)(b)(1) is a claim filed for a week of benefits immediately following a seven-day period in which he has not filed a claim.

4. A continuous claim occurs when the claimant has filed for benefits on a weekly or biweekly basis without a break in his claim.

5. Unemployment compensation claimants in New Hampshire who have appealed a decision to the New Hampshire Superior Court and, while the appeal is pending, continue to file claims after the period of disqualification has ended, or file an initial claim, will not receive a determination until the certifying officer or office manager in the area office involved has received permission from the Benefit Payment Section to issue a determination.

6. When an appeal is filed in the Superior Court, NH RSA 282:5-G(3) and NH RSA 282:5G(4) require that:

The commissioner shall file with said clerk before trial a certified copy of the record on the claim which shall, upon being so filed, become part of the record of the case and part of the evidence in the case to be considered by the court.

7. When an adverse decision is appealed by a claimant, or an employer, to the Superior Court, notice is sent from the Legal Section to the Unemployment Compensation Bureau Director and the Employment Service Bureau Director to forward all claims and records on the claim that are in their possession to the Legal Section.

8. Once an appeal has been filed in the Superior Court, the area office of the New Hampshire Department of Employment Security is required to send all information on any claims filed to the Legal Section while the appeal is still pending in the New Hampshire courts.

9. While an appeal is pending in the New Hampshire court, the certifying officer or office manager of the area office involved is required by the deputy of the Unemployment Compensation Bureau (hereinafter deputy) to send a memorandum to the Legal Section, with a copy to the deputy and to the area supervisor, concerning whether or not a decision can be made on the claimant's current claim.

10. Prior to the summer of 1976, requests by certifying officers or office managers to make "determination" on claimants whose previous disqualification had elapsed and who had an appeal pending in Superior Court, would be made to the Benefit Payment Section of the Department of Employment Security with a copy of that request to the Legal Section, if the request was made in memorandum form rather than by telephone.

11. Since the summer of 1976, the Benefit Payments Section, at the direction of Roland Demers, Deputy of the Unemployment Compensation Bureau, has reviewed requests to make determinations on claimants whose appeals are pending in New Hampshire Courts by having the area supervisors meet with attorneys from the

Legal Counsel's office once a week. The majority of all claims filed by claimants who have appeals pending in the Superior Court are reviewed by an attorney and the area supervisor in this manner.

12. The area supervisors and attorneys discuss approximately six to ten cases a week where requests are sought to make new "determinations."

13. There are no specific written procedures which certifying officers or office managers are asked to follow in taking and deciding claims made by unemployment compensation claimants who have appeals pending in Superior Court. The instructions to certifying officers on how to forward claims to Legal Counsel and Benefit Payments Section have been given either through training or verbally and are not contained in any manual.

14. No specific statistical data is compiled on the length of time an individual claimant must wait between the filing of the claim and the date of the determination.

15. There are no written time guidelines published by the Benefit Payment Section of the New Hampshire Department of Employment Security that require a certifying officer or office manager to request advice or direction on whether or not a determination can or should be made.

16. However, the deputy requires that requests for determinations be made within a reasonable time. This directive is not in writing.

17. The New Hampshire Department of Employment Security state plan is at present and has during the entire period covered by plaintiffs' action been approved by the United States Secretary of Labor as required by 42 U.S.C. § 503.

There can be no question that the defendants process the claims of those who have appealed to the state court from a denial of unemployment compensation differently than those who do not appeal. If a claimant has an appeal pending in the state court from a previous denial of benefits, all subsequent claims are processed through

the Legal Section of the Department of Employment Security in conjunction with the Benefits Section. Duplicates of all claims must be filed with the Legal and Benefits Sections. The certifying officer of the area office that is handling the claim must obtain permission from the Benefits Section in Concord to make a determination on the new claim. Once permission is granted to issue a determination, the certifying officer exercises his/her independent judgment as to whether the claimant is eligible for benefits. No advice, pressure, or even a faint suggestion as to a claimant's present eligibility is made by the Benefits or Legal Sections. That decision rests solely with the certifying officer in the local office.

Two basic factual determinations must be made:

1. What delay, if any, in processing claims of the plaintiff class results from this procedure; and
2. Does such delay violate the "when due" provision of the Act?

The constitutional issue implicating the Due Process Clause of the Fourteenth Amendment is not reached if there has been a statutory violation.

Simply put, the defendants' position is that the plaintiffs have not proven any undue delay.

Plaintiffs have submitted in evidence examples of time delays experienced by eighteen members of plaintiff class. Exhibit 1. This exhibit is in the form of summaries for each of the eighteen individuals and is submitted pursuant to Rule 1006 of the Federal Rules of Evidence. The summaries are based on plaintiffs' requests for admissions, documents from defendants' exhibits regarding these cases, affidavits filed by the defendants, the testimony of plaintiffs' witnesses at the trial, and counsel's calculations. There was also entered in evidence the complete files of seventeen of the eighteen individuals.

Defendant has objected to Exhibit 1 on various grounds: that it is not accurate, that it does not contain summaries, that vital facts are omitted, and that the

exhibit does not represent a fair cross section of the plaintiff class.

I overrule the defendants' objections to this exhibit. I allow in evidence the deposition of Klupchak. Exhibit 2.

In order to save time at the trial, I allowed the defendants to file after trial an analysis by Armand Demers, DES Supervisor, of the records of each of the eighteen individuals. This analysis was based on Demers' knowledge, experience, and the computer information that was available to him.

I find that the time delay experienced by the eighteen individuals is a fair representation of the time delays experienced by the plaintiff class.

I have made a computation based on the time delays in Exhibit 1 and find that there was an average delay of seventy-three days from date of filing to date of determination.

I have also made a computation based on the time delays as set forth in the Demers summary. I have excluded from this computation any delays of over one year on the theory that they are aberrations and should not be included as part of defendants' normal processing procedure. I have included in this computation delay periods noted by Demers that were not included in plaintiffs' Exhibit 1. These periods were, in all instances, much shorter than any of the periods reflected in Exhibit 1. I find, based on Demers' summary and analysis and my modifications, that there was an average delay of thirty-four days from date of filing to date of determination.

Based on all of the evidence, I find that the delay experienced by the plaintiff class was between thirty and forty days from date of filing to date of determination.

Based on the testimony of Lane, Anderson, Armand Demers, and Roland Demers, I find that the time taken for processing claims for those persons other than the plaintiff class is less than fourteen days and that under normal circumstances it takes three days to get a check in the mail after a total week of unemployment.

The question now is whether the delay encountered by the plaintiff class violates the "when due" clause of the Act.

While there are no cases covering this particular aspect of the payment of unemployment compensation benefits, the Supreme Court has spoken generally in this area. The seminal case is *California Human Resources* v. *Java*, 402 U.S. 121, 130, 131, 133 (1971) in which the Supreme Court outlined the congressional purpose and intent of the Unemployment Compensation Act.

> The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee. Probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was administratively feasible this must be regarded as what Congress was trying to accomplish.
>
> • • • •
>
> Other evidence in the legislative history of the Act and the commentary upon it supports the conclusion that "when due" was intended to mean at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard.
>
> • • • •
>
> We conclude that the word "due" in § 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment.

In *Fusari* v. *Steinberg*, 419 U.S. 379, 387, 388 (1975), the Court reiterated: "The basic thrust of the statutory 'when due' requirement is timeliness" and cited *Java*, *supra*.

In *Phillips* v. *Dawson*, 393 F. Supp. 360 (W.D. Ky. 1975), the court ordered the state agency to process all uncontested employment benefit applications "in such a manner that payment be made or delivered personally to the worker within 24 days after the initial application for benefits has been filed." *Id.* at 366.

While the defendants may not intend to penalize those persons who have appealed the denial of benefits to the state court, the system it uses for processing their new claims certainly singles them out for special treatment.

The defendants have advanced a number of reasons for using this system which can be boiled down to essentially three: (1) that it is necessary for the Benefits and Legal Sections to get all of the files of those persons who have taken an appeal from an unfavorable finding so as to be able to prepare the court case; (2) that the system has been in existence since 1956; and (3) that there were special programs in 1975 and 1976 that resulted in a substantial increase in the caseload of the Department.

None of the reasons advanced convince me that the field certifying officer should have to wait for permission from the Concord office before making a determination of the claim before him.

I can understand why both the Benefits and Legal Sections must have the file information as to anyone who has appealed, but the field officer retains a copy of all the information sent to Concord. While the evidence on this was not entirely clear, I must assume that copying machines are available for use in the regional offices.

Both Concord and the field offices should know if and when an appeal to court has been taken. But the fact that an individual has exercised his statutory right to appeal from an adverse decision should not trigger a delay in determining whether he is entitled to benefits for a new claim. The field office is then considering different facts in making a determination as to whether the new claim should be allowed.

Even assuming that permission for the certifying officer to make a new determination is now made within seven days due to the new weekly conference procedure (testimony of Roland Demers), that is still seven days longer than it takes for one who does not have an appeal pending.

An increase in caseload is an understandable reason for a slowdown in processing all claims, but it does not explain disparity of the treatment inherent in the system. It should be unnecessary to point out that the fact that this procedure goes back to 1956 does not make it either immutable or reasonable.

Since the determination of whether or not the new claim should be allowed is made solely by the certifying officer in the field, no valid reason has been advanced as to why this determination should wait until the Benefits and Legal Sections in Concord have authorized the officer to make it.

Both the federal guidelines and the Department's practice establish fourteen days as a reasonable period for processing claims.

I rule that, under normal circumstances a delay of fifteen days or more between the date of filing for a claim and the date of determination violates the "when due" clause of the Act. Circumstances resulting in a general slowdown of processing all claims would not constitute a violation as to the plaintiff class.

Since I have found that the defendants' procedure constitutes a statutory violation, there is no need to discuss or rule upon the alleged constitutional violation.

WHEREFOR IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That defendants' administrative scheme creates unjustifiable and arbitrary delays in the redetermination of eligibility for unemployment compensation benefits, and that an otherwise eligible claimant for such benefits is thereby deprived of them so as to violate his rights to a

determination "when due" of his claim for unemployment compensation benefits pursuant to 42 U.S.C. § 503 (1) of the unemployment compensation section of the Social Security Act.

2. The defendants, their agents, servants and employees shall notify promptly by first class mail all persons who have cases pending in the Superior Court on appeal and whose claim for redetermination of eligibility has been pending more than fifteen days that they are now eligible for such benefits and may reopen their claim.

3. The defendants, their successors and officers, agents and employees are hereby ordered to henceforth process all claims of all present and future applicants for unemployment compensation benefits whose initial claim for benefits was denied or may be denied and who has appealed such denial to the state court and whose period of disability has expired or will expire prior to the filing of their renewed claim within fifteen days after a previous period of disqualification has expired.

SO ORDERED.

/s/ Hugh H. Bownes
United States Circuit Judge
Sitting By Designation

November 15, 1977

cc: Michael M. Black, Esq.
Raymond J. Kelly, Esq.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL.

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

ORDER—December 16, 1977

My order dated November 15, 1977, is amended to read as follows:

1. That defendants' administrative scheme creates unjustifiable and arbitrary delays in the determination of eligibility for unemployment compensation benefits, and that an otherwise eligible claimant for such benefits is thereby deprived of them so as to violate his rights to a determination "when due" of his claim for unemployment compensation benefits pursuant to 42 U.S.C. § 503 (1) of the unemployment compensation section of the Social Security Act.

2. All persons who have an appeal pending in the New Hampshire Superior Court and have claimed unemployment compensation for a week that is not already covered by a decision of the Department of Employment Security and whose intrastate claims have been pending more than fifteen days from the end of such week shall be promptly notified by first-class mail by the Department that they are now eligible for a determination and to visit an office of the New Hampshire Department of Employment Security to file claims or other appropriate action within ten days of the mailing of said notice. If the claim is an interstate one, then the pending period may be extended by not more than ten days.

3. The defendants, their successors and officers, agents and employees are hereby ordered to henceforth process all intrastate claims of present and future applicants for unemployment compensation benefits whose initial claim for benefits was denied or may be denied and who has appealed such denial to the state court and whose period of disqualification has expired or will expire prior to the filing of their renewed claim within fifteen days after a previous period of disqualification has expired. Interstate claims shall be processed within twenty-five days after a previous period of disqualification has expired.

SO ORDERED.

/s/ Hugh H. Bownes
United States Circuit Judge
Sitting By Designation

December 16, 1977

cc: Michael M. Black, Esq.
Raymond J. Kelly, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

File No. 78-1018

RICHARD H. WHITE, ET AL., PLAINTIFF, APPELLEE

v.

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL.,
DEFENDANT, APPELLANT

MOTION TO REMAND TO THE DISTRICT COURT FOR THE PURPOSES OF ENTERTAINING A CONSENT DECREE—Filed December 8, 1978

NOW COMES the Defendant-Appellant and respectfully requests that this Court remand this appeal to the District Court for the purpose of the District Court review of a proposed consent decree for the following reason:

1. The Defendant-Appellant and Plaintiff-Appellee have agreed to a consent decree in this matter.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY,
BENJAMIN C. ADAMS, COMMISSIONER
By his Attorney:

/s/ Michael M. Black

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1018

RICHARD H. WHITE, ETC., PLAINTIFF, APPELLEE

v.

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL.,
DEFENDANTS, APPELLANTS

ORDER OF COURT

Entered December 11, 1978

Upon motion of appellant,

It is ordered that this cause is hereby remanded to the district court for the purpose of entertaining a consent decree.

It is further ordered that mandate issue forthwith.

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Black and Kelly.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action File No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFF

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, BENJAMIN C. ADAMS, COMMISSIONER, ET AL., DEFENDANT

CONSENT DECREE

1. On December 16, 1977 this Court amended its Opinion and Order issued November 15, 1977 enjoining the defendants from further action not consistent with the Court's order.

2. On December 27, 1977 the defendants appealed the November 15 and December 16, 1977 Opinion and Order.

3. The order of the District Court has been complied with.

4. The Defendants have, with few exceptions, always met the United States Department of Labor's guidelines in processing intrastate unemployment compensation claims.

5. The court order of December 16, 1977 is hereby modified. All prior orders and judgments in this action are superseded.

6. The Defendants will continue to follow the standards as currently set forth by the United States Department of Labor at 20 CFR 640.5, in processing claims of the plaintiffs. Economic circumstances resulting in a general slowdown in processing all claims or circumstances resulting in a general slowdown of an entire category of claims such as interstate claims and/or

special federal unemployment programs would not constitute a violation of this decree.

/s/ Raymond J. Kelly
Counsel for Plaintiff

/s/ Michael M. Black
Counsel for Defendants

/s/ Shane Devine
U.S. District Court Judge

January 26, 1979
Date

cc: Raymond J. Kelly, Esquire
Michael M. Black, Esquire

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL.

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, BENJAMIN C. ADAMS, COMMISSIONER, ET AL

JUDGMENT

In accordance with the approval dated January 26, 1979 of the parties Consent Decree by the Honorable Shane Devine, United States District Judge; judgment is hereby entered.

By the Court,

_____

Clerk

January 26, 1979

cc: All Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFFS

v.

N.H. DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL., DEFENDANTS

MOTION FOR ATTORNEY FEES PURSUANT TO 42 U.S.C. § 1988—Filed June 7, 1979

NOW COMES the plaintiff and the members of his class by their attorneys, New Hampshire Legal Assistance, and move this Court as follows, and says:

1. The above-entitled action was brought by the plaintiffs to enjoin the defendants from depriving them of their rights under the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983 and 42 U.S.C. § 503(a).

2. 42 U.S.C. § 1988 provides that this Court in its discretion may award reasonable attorneys fees as part of the costs to a successful litigant in an action to enforce 42 U.S.C. § 1983.

3. This Court (Bownes, J.) on November 15, 1977 and December 15, 1977 ruled in favor of plaintiff's claims concerning the unlawful delay by the defendants in processing claims for unemployment compensation benefits.

4. An appeal was taken by the defendants on December 27, 1977 to the First Circuit United States Court of Appeals.

5. Defendant's appeal to the First Circuit was remanded on December 10, 1978 on their own motion and a Consent Decree was filed with this Court, and ap-

proved by the District Court (Devine, J.) on January 26, 1979.

6. The prosecution of this complex case has heavily taxed the resources of plaintiff's counsel in terms of expenditure of funds and attorney time. Plaintiff's counsel estimates conservatively that over 250 attorney hours were spent in the preparation and presentation of this case.

7. That plaintiffs are the "prevailing party" in this action and are entitled to reasonable attorneys fees upon the filing of the Consent Decree, *see Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978).

WHEREFORE, plaintiffs respectfully request that this Court award them reasonable attorneys fees as part of the costs taxable against the defendants and order such other and further relief as may be equitable and just.

Respectfully submitted,

RICHARD H. WHITE, et al.
By Their Attorneys
NEW HAMPSHIRE LEGAL ASSISTANCE

By /s/ Raymond J. Kelly

88 Hanover Street
Manchester, N.H. 03101

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFFS

v.

N.H. DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL., DEFENDANTS

ITEMIZED BILL IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS FEES

NOW COME the plaintiffs, by their attorneys, New Hampshire Legal Assistance, and submit the following information to the Court to assist it in its determination of awarding attorneys fees to the plaintiffs.

1. All attorneys fees awarded in this case will be retained by New Hampshire Legal Assistance and no portion of said fees shall be paid to the Legal Service Corporation, Washington, D.C. *See* 45 C.F.R. § 1609, *Federal Register*, Vol. 41, No. 177, September 10, 1976.

2. Hours spent on this case by Raymond J. Kelly, Esquire are 312.35 non-court time and 22.45 hours court time. See itemized statement attached.

3. Hours spent on this case by Alan J. Cronheim, Esquire are — hours non-court time and — hours court time. See itemized statement to be submitted.

4. The hours listed in the attached itemized statements do to reflect the hours spent on this case by law students, paralegals and other support staff.

5. Attorneys fees are sought at the rate of $45.00 per hour for non-court time and $55.00 per hour for court time for Attorney Kelly and $35.00 per hour non-court time and $40.00 per hour court time for Attorney Cronheim.

6. Total attorneys fees sought in this case are as follows:

Raymond J. Kelly, Esquire

Alan J. Cronheim, Esquire

TOTAL: 334.80 hours

Respectfully submitted,

RICHARD H. WHITE, et al.
By Their Attorneys
NEW HAMPSHIRE LEGAL ASSISTANCE

By /s/ Raymond J. Kelly

88 Hanover Street
Manchester, N.H. 03101
(603) 668-2902

BILL FOR SERVICES

Raymond J. Kelly, Esquire

DATE	SERVICE	HOURS
December 8, 1975	Interview client on delay in receiving determination	1.00
December 9, 1975	Phone contact with Albion Lane, DES Certifying Officer on delay	.30
January 14, 1976	Letter sent to Albion Lane, DES Certifying Officer requesting action on White's claim	.35
February 4, 1976	Prepare letter to DES counsel on White delay	.45
February 20, 1976	Conference with client	.45
February 14, 1976	Research on § 1983 Complaint for Injunctive and Declaratory Relief	7.20

DATE	SERVICE	HOURS
February 18-19, 1976	Drafting Complaint	5.00
February 23, 1976	Review Complaint with Executive Director, New Hampshire Legal Assistance	2.45
February 25, 1976	Prepare Affidavits for Temporary Relief Interview Witnesses	3.45
March 1, 1976	Prepare Motion for Temporary Relief	1.20
March 23, 1976	Prepare Motion to Certify Class	1.00
March 25, 1976	Prepare Interrogatories & Requests to Produce	4.00
April 1, 1976	Prepare Affidavits in Support of Class Action	4.30
April 7, 1976	Interview Ronald Bogue— Intervenor	2.00
April 8, 1976	Prepare Motion & Complaint in Intervention	2.45
April 9, 12, 1976 16-17, 1976	Research on Memorandum in Opposition to Motion to Dismiss	18.00
April 13, 14, 1976	Draft Preliminary Objection to Defendant's Motion to Dismiss & Dismissing Intervenor	4.00
April 25, 26, 1976 30	Preparation of Memorandum in Opposition to Defendant's 7 different grounds for dismissal of Complaint	17.00
May 1, 1976	Prepare Affidavit of Intervenor, R. Bogue	.45
May 2, 1976	Interview witness R. Bogue	1.30
May 2, 1976	Review 10 Affidavits in Support of Class Action	3.45
May 6, 1976	Court Appearance on Motions to Dismiss (Bownes, J.)	1.00
May 17, 1976	Prepare letter to DES counsel on Interrogatories	.50
May 25, 1976	Review Defendant's 8 page Answer to Complaint	2.00

DATE	SERVICE	HOURS
June 11, 1976	Prepare letter to DES counsel on Failure to Receive Answers to Interrogatories	.45
June 25, 1976	Prepare letter to DES counsel on Interrogatories	.20
June 30, 1976	Prepare Motion to Compel Answers to Interrogatories & Requests to Produce	1.00
July 14, 1976	Prepare Memo on Preliminary Pre-Trial for Assisting Counsel	2.00
July 20, 1976	Preliminary Pre-Trial (Barry, Magistrate) & Hearing on Motion to Compel Answers to Interrogatories (Philip Mangones, Esq., for plaintiffs)	1.00
August 6, 1976	Conference with Defendant's counsel re Interrogatories	1.00
August 13, 1976	Motion to Compel on Interrogatories	.35
August 13, 1976	Motion to Take Deposition by Tape Recorder & Prepare Sample Order & Memorandum of Law in Support	3.50
August 13, 1976	Prepare Supplemental Interrogatories	2.45
August 30, 1976	Prepare for Hearing on Plaintiffs' Motion to Compel Answers & Defendant's Objection to Review of Files	2.20
September 9, 1976	Hearing (Barry, Magistrate) on Motion to Compel, Settlement Possibilities, Proposed Redetermination Guidelines (See Order of 9/13/76)	1.00
September 16, 1976 17, 1976	Pursuant to Court Order Draft Proposed Guidelines for Redetermination of Claimant's Eligibility for Benefits	3.00
September 29, 1976	Prepare letter to DES counsel on Interrogatories	.35

DATE	SERVICE	HOURS
September 30, 1976	Hearing (Barry, Magistrate) on Proposed Guidelines & all pending motions	.45
October 8, 1976	Prepare Memo to NHLA Branch Law Offices on Survey for Statistical Delays	1.20
October 22, 1976	Prepare Memo on Assignment, Review & Correlation of preliminary results of 10 county DES delay survey	3.45
November 2, 1976	Prepare Memo Assigning Additional Manpower to Review all N.H. Superior Court Dockets on DES Appeals	1.00
December 8, 1976	Prepare Memo to Branch Law Offices on Retrieval of DES case review	.35
December 9, 1976	Prepare Motion to Extend Time to Complete Discovery	.25
December 14, 1976 15, 1976	Review Cheshire; Sullivan County Superior Court dockets on DES cases	8.00
January 14, 1977 15, 1977	Review & analyze survey information on delays in redetermination of unemployment compensation eligibility	6.00
January 14, 1977	Appear in Court—Trial List	1.30
January 25, 1977	Prepare letter & list of files for DES counsel requesting opportunity to review said files pursuant to Court order	.45
February 7, 1977	Prepare follow-up letter to DES counsel on review of Department files	.25
February 18, 1977	Prepare Motion for Extension of Time to Complete Discovery	.35
February 22, 1977 23, 1977	Discussions with DES counsel on review of their files	1.50

DATE	SERVICE	HOURS
March 2, 1977	Prepare letter to DES counsel on claimant files, retainers, & scheduling depositions	.45
March 11, 1977	Hearing (Barry, Magistrate) on Defendant's Objection to Extension of Time to Complete Discovery & Compel Production of Documents	1.00
March 15, 1977	Review claimant files at DES headquarters	4.00
March 16, 1977	Deposition of Albion Lane	2.50
March 17, 1977	Review claimant files at DES headquarters	4.30
March 22, 1977	Review claimant files at DES headquarters	5.25
March 22, 1977	Conference with DES counsel re refusal to produce certain documents in file of Eva Rousseau	.45
March 23, 1977	Prepare for deposition of R. Demers & R. Anderson	3.45
March 24, 1977	Deposition of R. Demers & R. Anderson	4.00
March 25, 1977	Prepare Motion to Produce Documents	1.00
March 27, 1977 30, 1977 April 1, 1977	Prepare Requests for Admissions	12.45
March 31, 1977	Review files at DES headquarters	4.00
April 4, 1977	Prepare Motion for Continuance of Pre-Trial & Trial Date	.30
April 12, 1977	Hearing (Barry, Magistrate) on Continuance, Plaintiffs' Motion for Production of Documents & Review of Request for Admissions	1.00
April 20, 1977	Review contested documents clerk's office	1.30
April 21, 1977	Final Pre-Trial (Bownes, J.)	.45

DATE	SERVICE	HOURS
May 2, 3, 1977	Prepare settlement letter under local Rule 14(c)(1)	3.20
May 4, 1977	Prepare Motion to Determine Sufficiency of Responses & Compel Documents	3.35
May 5, 1977	Research & prepare memorandum of law on Motion to Determine Sufficiency of Responses	5.15
May 6, 1977	Hearing (Barry, Magistrate) on Request for Admissions	1.00
May 8, 1977	Prepare Stipulation of Facts for trial	4.45
May 12, 1977	Review Stipulation of Facts with DES counsel	3.50
May 13, 1977	Research & Prepare Pre-Trial Memo	3.10
May 15, 1977	Prepare Pre-Trial Memo	2.00
May 16, 1977	Prepare Proposed Stipulation of Facts and filed with clerk	4.00
May 18, 1977	Conference with co-counsel for brief writing & evid. responsibilities	.75
May 19, 1977	Research for brief	3.10
May 23, 1977	Prepare brief	4.45
May 23, 1977	Preparation of Pre-Trial Memorandum of Law	4.50
May 28, 1977	Preparation of Pre-Trial Memorandum of Law	2.00
May 30, 1977	Preparation of Pre-Trial Memorandum of Law	3.15
May 31, 1977 June 1, 1977	Preparation of Pre-Trial Memorandum of Law	3.50
June 1, 1977	Meet with opposing counsel to discuss exhibits	1.40
June 3, 1977	Preparation of Pre-Trial Materials	1.35
June 5, 1977	Write Pre-Trial Memorandum of Law	3.20

DATE	SERVICE	HOURS
June 7, 1977	Pre-Trial Preparation with co-counsel	3.35
July 1977	Call of Pre-Trial List	1.00
July 31, 1977	Preparation for Deposition of M. Klupchak	1.30
August 1, 1977	Deposition of M. Klupchak	2.05
August 2, 1977	Prepare settlement letter to DES general counsel	.50
August 10, 1977	Read Klupchak Deposition and correct from tape recording	.50
August 18, 1977	Final Pre-Trial (Bownes, J.)	.45
August 26, 1977 27, 1977	Prepare & Review Summaries of Evidence	11.00
August 31, 1977	Copy and prepare additional Summaries of Evidence	6.00
September 1, 1977 2, 1977	Interview Witnesses for Trial	4.25
September 2, 1977	Meet with co-counsel on Trial Preparation	3.10
September 4, 1977	Review DES files and outline for trial	2.05
September 5, 1977	Interview Witnesses & Continue Trial Preparation	4.00
September 18, 1977	Prepare & Review Additional Summaries of Evidence	1.40
October 3-4-5, 1977	Interview Witnesses for Trial	3.40
October 11, 1977	Discuss Trial Strategy with Director of Litigation	1.30
October 11, 1977	Review Materials for Trial	2.55
October 12, 1977	Trial	7.30
October 12, 1977	Prepare for next day of trial	1.55
October 13, 1977	Trial	6.15
October 19, 1977	Prepare Post-Trial Memorandum	3.45

DATE	SERVICE	HOURS
October 21, 1977	Prepare Objection to Demers' Opinion re Summaries of Evidence	5.50
November 21, 1977	Conference with co-counsel re Defendant's Motion for Stay of Execution	1.00
November 28, 1977	Prepare Objection to Defendant's Stay of Execution Motion	.50
November 28, 1977	Prepare Plaintiff's Objection to Defendant's Proposed Changes & Exceptions	1.00
November 30, 1977	Hearing on Defendant's Motion for Stay of Execution & Amend Judgment	.35
December 13, 1977	Plaintiff's Comments on Defendant's Proposed Changes	2.20
December 30, 1977	Prepare & File Objection to Defendant's Second Request for a Stay Pending Appeal	.50
January 25, 1978	Review Pleadings & File for Designation of Appendix	.55
January 26, 1978	Meet with Defendant's Counsel on Designation of Appendix	1.40
February 1, 1978	Review Contested Issues on Joint Appendix	1.50
March 3, 1978	Research on Issues in Defendant's Appeal	4.50
April 14, 1978	Conversation with DES Counsel re Settlement on Appeal	.30
July 27, 1978	Review Trial Transcript for Appeal	4.45
August 18, 1978	Final Review of Appendix Issues with DES Counsel & discussion of possible settlement language	2.45
September 17, 1978	Prepare Consent Decree	.40
October 6, 1978	Settlement Meeting—Portsmouth	1.30
Otcober 12, 1978	Discuss DES Consent Decree with co-counsel	1.20

DATE	SERVICE	HOURS
November 30, 1978	Review DES Counter-Proposal on Settlement	1.00
December 5, 1978	Discuss Consent Decree with co-counsel	.30
December 8, 1978	Sign Consent Decree & Discuss Implementation with DES counsel	.40
January 31, 1979	Prepare letter to DES counsel on Attorneys Fees	.20
February 28, 1979	Review DES letter on Attorneys Fees & Document Settlement Time	2.45
March 7, 1979	Prepare final letter to DES on Settlement of Attorneys Fees Issue	1.30
April 4, 1979 12, 1979	Calculate time spent on case from December 1975 through March 7, 1979	4.00

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFFS

v.

N.H. DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL., DEFENDANTS

OBJECTION FOR MOTION FOR ATTORNEYS FEES—Filed June 18, 1979

NOW COMES the Defendant, The State of New Hampshire, Department of Employment Security and objects to Plaintiff's Motion for Attorneys fees for the following reasons:

1. During Defendant's original discussions with client's attorneys concerning settlement, Plaintiffs' attorneys stated they would waive attorneys fees.
2. Plaintiff has waited too long to request attorneys fees as the District Court approved the Consent Decree on January 26, 1979 and the Plaintiff by letter allowed the Defendant only until April 1st in which to discuss attorneys fees.
3. The granting of attorneys fees in this case would be counter-productive as the State would be penalized for good faith efforts in settling this case.
4. The Plaintiffs are not a "prevailing party" as they agreed in the Consent Decree that the Defendant could continue what it had been doing prior to filing its complaint in the Federal Court.

WHEREFORE, the Defendant respectfully requests that Plaintiffs' Motion for Attorneys Fees be denied.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY,
BENJAMIN C. ADAMS, COMMISSIONER
By his Attorneys:

EDWARD F. SMITH
MICHAEL M. BLACK

/s/ Michael M. Black

Certificate of service (omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFFS

v.

N.H. DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL., DEFENDANTS

REPLICATION TO DEFENDANTS' OBJECTION TO MOTION FOR ATTORNEYS FEES— Filed July 6, 1979

NOW COME the plaintiff and the members of his class and by their attorneys, New Hampshire Legal Assistance, reply to Defendants' Objection to Motion for Attorneys Fees and state:

1. Plaintiffs, as prevailing party in this extensive litigation are entitled to a just award of attorneys fees pursuant to 42 U.S.C. § 1988.

2. The First Circuit has already stated that successful plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." *Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978) quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). No special circumstances exist such that appropriate fees should not be awarded.

3. a) Defendants, in objecting to an award of fees, first state that in "original discussions" with plaintiffs' counsel plaintiffs' attorneys stated that they would waive fees. While it is true that on or about August 18, 1978, such a discussion did occur, defendants' counsel conveniently fails to include reference to the further discussions between counsel.

b) On or about October 6, 1978, counsel for both parties discussed a draft Consent Decree prepared by defendants. In that draft there was a specific provision whereby each party was responsible for its own fees and costs. Counsel for the plaintiffs quite specifically rejected this proposal for several reasons, one of which was the waiver of plaintiffs' claim for attorneys fees.

c) Further, in November, 1978, counsel for the plaintiffs provided Attorney Black a copy of *Nadeau* v. *Helgemore*, supra, thereby further indicating an intention to pursue fees.

d) The fact that the final Consent Decree, which incidentally was prepared by counsel for the defendants, did not contain a waiver of plaintiffs' right to claim attorneys fees is a further indication that fees would be pursued.

4. Defendants next contend that fees should not be awarded because plaintiffs "waited too long" to claim fees. They note that counsel for the plaintiffs asked that defendants respond to their offer to conduct settlement discussions by April 1, 1979. Again, while it is true that plaintiffs raised the April 1 date, the fact that, as a courtesy, plaintiffs did not file their motion for fees until approximately sixty days after April 1 cannot be raised as a legal basis for denying legitimately earned attorneys fees.

5. a) Defendants further claim that the granting of attorneys fees in this case would be "counter-productive" because the State would be "penalized for good faith efforts in settling this case."

b) The First Circuit, in discussing the conduct of a defendant stated, "To begin with, the good faith of defendants is not a controlling factor in determining whether or not plaintiffs merit an award. . . . From [a] policy perspective it makes no difference whether plaintiff's suit yields favorable out of court results because a good faith defendant is brought to understand the illegality of his conduct and alters his behavior or because

an unrepentant defendant grudgingly signs a Consent Decree to avoid continued litigation expenses in a lost cause. The key issue is the provocative role of the plaintiff's lawsuit, not the motivations of the defendant." *Nadeau* v. *Helgemoe*, 581 F.2d at 280.

c) Defendants can hardly claim good faith conduct when, prior to trial, they reject a proposed Consent Decree which would have simply required them to follow certain federal regulations. The fact that after losing a hotly contested trial they were willing to sign a similar Consent Decree is a sign of improved judgment and not good faith.

6. a) Defendants finally contend that fees should not be awarded because plaintiffs were not a "prevailing party."

b) As the First Circuit noted, "It is abundantly clear and the Senate Report specifically states that in general parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005 (2nd Cir. 1975) and cases cited therein; *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F.Supp. 338 (D.Ore. 1969); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir. 1970); *Aspira of New York, Inc.* v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D. N.Y. 1975)." Senate Rep. No. 94-1011.

c) In the instant case, plaintiffs obtained a ruling wherein Judge Bownes stated that defendants' conduct "creates unjustifiable and arbitrary delays in the redetermination of eligibility for unemployment compensation benefits, and that an otherwise eligible claimant for such benefits is thereby deprived of them so as to violate his rights to a determination "when due" of his claim for unemployment compensation benefits pursuant to 42 U.S.C. § 503(1) of the unemployment compensation section of the Social Security Act."

d) Plaintiffs and defendants, by signing the Consent Decree in this case, did not overturn the holding in Judge Bownes' trial opinion. Instead the parties, after much discussion, were able to agree on a suitable order which remedied the statutory violation found by Judge Bownes.

e) Litigation in this case has lasted for more than three years. It is due to the persistent efforts of counsel for the plaintiffs that it has been successfully concluded. As a result, attorneys fees should properly be awarded in light of the voluminous work expended, the extensive evidence introduced and reviewed and the positive result achived.

Respectfully submitted,

RICHARD H. WHITE, et al.
By Their Attorneys

NEW HAMPSHIRE LEGAL ASSISTANCE

By /s/ Alan J. Cronheim

Simeon Smith House—The Hill
Portsmouth, New Hampshire 03801

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UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, *et al.*, PLAINTIFFS
v.
N.H. DEPARTMENT OF EMPLOYMENT SECURITY, *et al.*,
DEFENDANTS

ITEMIZED BILL IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS FEES— Filed August 14, 1979

NOW COME the plaintiffs, by their attorneys, New Hampshire Legal Assistance, and submit the following information to the Court to assist it in its determination of awarding attorneys fees to the plaintiffs.

1. All attorneys fees awarded in this case will be retained by New Hampshire Legal Assistance and no portion of said fees shall be paid to the Legal Services Corporation, Washington, D.C. *See* 45 C.F.R. § 1609, Federal Register, Vol. 41, No. 177, September 10, 1976.

2. Hours spent on this case by Raymond J. Kelly, Esq. are 311.35 non-court time and 23.45 hours court time. See itemized statement attached.

3. Hours spent on this case by Alan J. Cronheim, Esq. are 79.05 hours non-court time and 12.10 hours court time. See itemized statement attached.

4. The hours listed in the attached itemized statements do not reflect the hours spent on this case by law students, paralegals and other support staff.

5. Attorneys fees are sought at the rate of $45.00 per hour for non-court time and $55.00 per hour for court time for Attorney Kelly and $35.00 per hour non-court time and $40.000 per hour court time for Attorney Cronheim.

6. Total attorneys fees sought in this case are as follows:

Raymond J. Kelly, Esq.	$15,303.25
Alan J. Cronheim, Esq.	3,250.75
TOTAL	$18,554.00

Respectfully submitted,

RICHARD H. WHITE, ET AL.
By Their Attorneys

NEW HAMPSHIRE LEGAL ASSISTANCE

By /s/ Alan J. Cronheim

Simeon Smith House—The Hill
Portsmouth, New Hampshire 03801

BILL FOR SERVICES

Alan J. Cronheim, Esq.

DATE	SERVICE	HOURS
December 13, 1976	Review Rockingham County Superior Court files on DES cases	2.25
January 7, 1977	Review Strafford County Superior Court files on DES cases	1.75
May 2, 1977	Discuss settlement letter with co-counsel and review file of case	4.00
May 8, 1977	Review file on case and discuss Stipulations of Facts	2.50
May 15, 1977	Research Pre-Trial Memorandum	3.50
May 18, 1977	Conference with co-counsel to discuss Pre-Trial Memorandum	.75
May 22, 1977	Research and prepare Pre-Trial Memorandum	4.75

DATE	SERVICE	HOURS
May 23, 1977	Research and prepare Pre-Trial Memorandum	1.25
May 31, 1977	Prepare Pre-Trial Memorandum and review case file	3.50
June 2, 1977	Prepare Pre-Trial Memorandum	4.25
June 7, 1977	Pre-Trial Preparation with co-counsel	3.25
July 18, 1977	Meet with DES counsel	1.00
August 2, 1977	Discuss settlement letter with co-counsel	.25
August 16, 1977	Meet with DES counsel	.75
August 18, 1977	Final Pre-Trial Conference	.45
August 26, 1977	Prepare Summaries of Evidence	6.50
September 2, 1977	Interview witnesses for trial	1.50
September 4, 1977	Review file for trial	3.00
October 4, 1977	Interview witnesses for trial	1.00
October 10, 1977	Prepare for trial	3.00
October 11, 1977	Prepare for trial	2.50
October 12, 1977	Trial	5.30
October 12, 1977	Prepare for trial	2.50
October 13, 1977	Trial	6.00
October 19, 1977	Prepare for Post-Trial Memorandum	4.50
October 24, 1977	Prepare Post-Trial Memorandum and Objection to Demers' Opinions re Summaries of Evidence	5.00
November 21, 1977	Conference with co-counsel re Motion for Stay of Execution	1.00
November 30, 1977	Hearing on Defendant's Motion	.35
December 13, 1977	Prepare comments on Defendant's proposed Amendment of Judgment	1.00
January 26, 1978	Meet with DES counsel on appendix	1.25
August 18, 1978	Review case and meet with DES counsel to discuss settlement	3.00

DATE	SERVICE	HOURS
September 17, 1978	Prepare Consent Decree with co-counsel	.25
October 6, 1978	Meet with DES counsel to discuss settlement	1.25
October 12, 1978	Discuss Consent Decree with co-counsel	1.25
November 30, 1978	Review DES Consent Decree	1.00
December 5, 1978	Discuss Consent Decree with co-counsel	.30
March 7, 1979	Discuss Attorneys Fees with co-counsel	.50
June 27, 1979	Prepare Replication to Defendant's Objection to Motion for Attorneys Fees	2.50
July 11, 1979	Prepare Affidavit re Attorneys Fees	2.50

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

C. 76-71-L

RICHARD H. WHITE, *et al.*

vs.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

MOTION HEARING

Motion Hearing before the Honorable Martin F. Loughlin, United States District Judge, U.S. District Court, held at the United States Court House, Concord, New Hampshire on August 21, 1979, at 9:00 a.m.

APPEARANCES:

For the Plaintiff:

Raymond J. Kelly, Esq., and
Alan Cronheim, Esq.

For the Defendants:

Michael M. Black, Esq.

[2] (9:05 o'clock a.m.)

THE CLERK: The Court has for consideration this morning a hearing on motion for attorneys' fees in Civil No. 76-71, Richard H. White, et al. vs. the New Hampshire Department of Employment Security, et al.

THE COURT: Mr. Kelly?

MR. KELLY: Good morning, Your Honor. This is our motion for attorneys' fees, pursuant to 42 U.S.C., Section 1988. Before I discuss the standards that are applied in awarding attorneys' fees under this statute, I'd like, with the Court's permission, to give a brief history of the case.

Your Honor, this case was filed back in March of 1976. As the pleadings show, especially attached to the complaint, we had been in contact with the Department of Employment Security since the latter part of 1975 concerning the problems that Mr. White was having collecting his unemployment benefits. Briefly, what had happened was Mr. White had been initially disqualified from receiving unemployment benefits, and the disqualification was to run for 26 weeks. The Department had said he had voluntarily quit his job when he went into bankruptcy.

After his 26 week disqualification expired, he continued to sign up for benefits. He was told by the certifying officer, Albion Lane, in the Keene office of [3] D.E.S., there would be a decision coming pretty soon.

He came in to see New Hampshire Legal Assistance, in our Keene office, sometime in November of 1975, and said he had been waiting for almost two months at that time, and he had not received any checks, nor had he received any kind of a decision indicating whether he would receive his checks.

I was in contact with Mr. Lane, as the records in the file show, and there was a memo sent from Mr. Lane up to the Concord head office of the Department of Employment Security sometime in the early part of January of 1975, asking: Could he make a determination on Mr. White's claim?

After that, I wrote Brother Black a letter in the early part of February, I think a copy of which is attached to our complaint, telling him the problems that we were having. Brother Black and I have done a number of unemployment compensation appeals at that time, and we were trying to short circuit what might be a long and costly piece of litigation.

So, I wrote to Brother Black, and when I didn't get any response, we filed suit on March 4th, 1976.

Approximately two weeks after we filed suit, Mr. White received a retroactive check for 26 weeks of bene-

fit, at his weekly benefit amount of ninety-five dollars [4] a week. And at that point in time, we withdrew our request for preliminary relief.

After Mr. White received his preliminary relief, the Department filed motions to dismiss. In fact, I think they filed eight separate motions to dismiss, Your Honor, based on various claims of immunity, immunity of Benjamin Adams, immunity of the State, immunity of Benjamin Adams as a judicial officer. They also objected to our class action, objected to any move to intervene new claimants in the case, objected to our interrogatories that had been filed.

And so we had a hearing. Our first hearing was in front of Judge Bownes on May 6th, 1976, and the order, which is part of the records in this case, denied the motion to dismiss; granted that Benjamin C. Adams individually be dismissed from the case; but kept him in the case in his official capacity and also kept the Department in it's official capacity; the motions to strike of the Department were denied; class was certified; interrogatories were ordered to be answered; and this started the litigation and it's process.

Now, what happened after that, Judge, I think can be seen by best looking at the docket sheets that go along with these files.

Up to December 30th, 1977, there are [5] actually 146 docketings or pieces, you know, separate documents that had been filed in this case. I would imagine, now, with the request for attorneys' fees, the consent decree, the objection, and also the memo that I filed yesterday on the issue of attorneys' fees, that there are well over 150 documents in this case, now.

The problem that we had, basically, was this: We were required to look into a system that had no records, had no reporting system; and we were also required to review a substantial amount of files that the Department had kept on the various claimants in this case. Your Honor, at the time of trial I think Brother Black and

I remember that one of the side benchs up in the main courtroom was filled literally from here, expanse of my arms, were boxes filled with all the individual papers, I think it was 17 or 20 class representatives who's files had to be brought into the case as evidence in the case.

Prior to trial, however, Your Honor, at the suggestion of Magistrate Barry, and there is an order of this on September 13th, 1976, Mr. Barry recognized that this case was going to involve extensive and very voluminous discovery. He said, "You two people should sit down, let's see if we can try to work this thing out and get some kind of a settlement in the case."

And what I did at that time was to draft up [6] a proposed memorandum possible consent decree which at least was unsuccessful in getting the Department to settle the case at that time.

Subsequent to that, we were in contact with Brother Black in August, of 1976, and I wrote Brother Smith, as general counsel for the Department, and asked him if there was any possibility of settling this case based upon the federal regulations of timeliness that are in the 20 C.F.R., the Code of Federal Regulations, that attempt to settle the case prior to trial was unsuccessful.

All during this period of time, Your Honor, that is the documents indicate and, as our brief indicates, I think it was on the 10th and 11th, we were constantly in front of Magistrate Barry on the issue of what evidence we can get, what files we could review. And another words, Magistrate Barry took over the whole discovery procedure in this case.

I mentioned in the brief, at pages 14 and 15, that there were seven pre-trial hearings. I was wrong in that. I think there were nine. One of the ones that I didn't mention in here was an order of April 21st, 1977, when Judge Bownes, I think at one of our last pre-trials, ordered the Department to answer our requests for admissions. It was basically the situation we were faced with, Judge.

We had this voluminous paper information, [7] and we wanted to synthesize it, to be able to show how a system that was strictly an oral system, that did not have any written rules and regulations, how it worked and how it affected possibly up to 400 claimants a year in the State of New Hampshire.

Basically, the class that we represented were people who had been denied unemployment benefits, filed an appeal to Superior Court, and while their appeal was pending in Superior Court, they had gone back in to file a new or separate claim.

The problem that occurred: Every time a person had a case in litigation in the Superior Court, went in to file a new or separate claim, their file had to be reviewed in the Concord office, to see if an okay could be given, a determination on the new claim.

As Judge Bownes found in his order, those delays amounted up to between six and seven weeks per claimant; in the case of the named claimant, Mr. White, they stretched over six months.

As a result of that, we had to review the Department's files, but only after we had taken a county-by-county search of the Superior Court Dockets, because we were not granted access to the appeal files of the Department. The Department claimed that they are confidential. Magistrate Barry did not order them to let us review those files, even [8] though we claimed that they were class members and, therefore, we were the attorneys representing them.

So, we had to do a county-by-county review of the Superior Court Dockets to find which cases, and also to get retainers from each of those clients, to go back in and to review the Superior Court files that the Department of Employment Security had. Once we had done that, we realized that we were going to run into another problem, which was how to present all of this evidence in a timely fashion. What we did, we used the new Rules of Federal Evidence and made summaries of evi-

dence of each of the claimants; and we synthesized what we considered to be the essential facts under Rule 1006 of the Federal Rules of Evidence, and I don't think the Court has this because they gave us back the exhibits, but I'd like to give these back to the Court, if the Court wants to review it.

These are the summaries of evidence of the class representatives in this case, and there's also a copy of the requests for admissions.

Now, these were all exhibits in the case, and at the end of the case they were given back to us. And it's our contention that we probably cut the trial time in half by using summaries of evidence and only using highlighting certain named plaintiffs as though to show the Court what the delays were, what the problems were in the individual [9] offices, and how this system failed to provide benefits when they were due.

As a result of this, Judge, a two-day trial in October, 1977, Judge Bownes allowed the department's expert on computers to testify afterwards, by way of written testimony, and we were allowed to comment on that.

The Judge then issued his decision, and I think going a step further than what was normally perceived, he allowed the Department to even make purposed exceptions to his orders and allowed us to comment on the purposed exceptions.

So, this process was a process of my memorandum, it was a pre-trial brief, a post-trial brief, briefs at the time of the motions to dismiss, they were briefs filed in support of taking depositions by tape recorder; they were briefs filed on the motion to determine the sufficiency of the responses to the request for admissions; there was a lot of paperwork here, Judge. What we were trying to do was to develop a record the Court could use to understand the system.

Now, at the end of the trial, the Department appealed to the First Circuit. They ordered a transcript. Brother Black and I both thought the transcript might come in

30 or 60 days, as it was probably six months before they saw the transcript.

[10] So, during that period of time that we were waiting for the transcript to be filed, and we were filing requests to continue the case in the First Circuit, plaintiffs initiated settlement discussion with the Department, as I've mentioned in our brief. The first settlement discussions were in October, of 1978, and came about as a result of our having to meet with Brother Black to agree on a joint appendix in the case, and I mentioned to him at that time we had a purposed consent decree that we would be willing to discuss with him and, in fact, at that time that was the third consent decree that we had given to the Department.

We had given them two previous to trial, and now we had this third consent decree, we wanted to see, could be the basis for discussions on settling this case. And at that time, as our pleadings indicate, we said that, if that consent decree was the basis for settling the case, that we would be willing to discuss the possibility of waiving our fees.

Now, we never had a response to that consent decree. We sent the Department a subsequent consent decree in September, I think it was September 19th, 1978, because I have a copy of Brother Black's—Brother Black gave me a copy at one point of the consent decree, and it was the date stamped in it.

Out of that September 19th purposed consent [11] decree, we had a subsequent meeting in October, of 1978, the first week in October, of 1978, where we discussed further the possibilities of settling this case.

At that time Brother Black brought his first—the first time the Department had offered it's own consent decree in the case.

One of the sections in the consent decree said that each party will bear it's own costs and it's own fees.

In addition to the substantive objections that we had to the consent decree and to some of the language that

the Department wanted to have in the consent decree, we also said that, having each party bear it's own costs and fees was unexceptable to us, and to strengthen our position I gave to Brother Black at that time a copy of the resent First Circuit decision in Nadeau vs. Helgemoe, which is sited in our brief. The Nadeau case being one where attorneys' fees were granted by the First Circuit, subsequently ordered by Judge Bownes, after a settlement was worked out on pending litigation.

After that discussion, there were subsequent discussions with the Department of Employment Security. Brother Black got back to us during the fall, he came in with a revised consent decree, one that made no mention of attorneys' fees. This then became the basis of subsequent [12] discussions, which ended with our signing it in the early part of December, of 1978.

It was then forwarded to Judge Devine, after the First Circuit remanded the appeal back to the District Court, and it was signed by Judge Devine on January 29th, I think, 1979.

Now, Your Honor, as our brief points out, we believe based upon the summary I've given you and the fact we were the prevailing party and the District Court, that the final consent decree that was signed incorporates the federal regulations that we have been asking the Department to settle on prior to trial, that in fact we are the prevailing party and that we are entitled to reasonable attorneys' fees.

Now, in this circuit, attorneys' fees are governed by the decisions in King vs. Greenblat, which is sited in our brief, and also by Nadeau vs. Helgemoe, as far as involving consent decrees.

THE COURT: I should have told you at the beginning I spent part of yesterday and early morning going through your brief, which is very substantial.

MR. KELLY: The only point I would make, Your Honor, then about the reasonable fees of the attorneys' is this: When you look at the case and you look at the

docket page, that shows the substantial amount of work [13] that was done, the fact that one attorney from New Hampshire Legal Assistance was litigating this case up to the spring, of 1977, and it was only in the spring, of 1977, that Brother Cronheim assisted me in the case because of the fact we now had to do a county-by-county review of the Superior Court Dockets. It was only because of these additional discovery burden placed upon us in order to ascertain the size of the class and the class members, that there were two attorneys and the fact the Department, in some of it's depositions, had used two attorneys prior to trial, and this case was complex enough so there was a necessity for mutual counsel. And during trial, Brother Cronheim cross-examined almost all of the Department's witnesses. He was the one who cross-examined Brother Smith. He was also in charge of preparing the summary of evidence and lead a very, very instrumental role in this case because of the complexity of the case, because of the need for two attorneys.

So, we feel, Your Honor, the time he has spent on this case is compensable; and based upon his experience in Federal Court, the rate that he's seeking is reasonable in all respects.

The other point I would make, Your Honor, is that I think plaintiffs, during the history of this litigation, attempted at all times to reach some kind of a settlement that noted timeliness standards, that what we were [14] looking for, we were dealing with an oral system that didn't have any written regulations; and as Judge Bownes points out in his decision, there were no other cases on point involving this type of situation where someone is delayed receiving benefits because of a subsequent court appeal. To that extent, it's a very unique case that has, as far as I know in doing my research, never been duplicated in the country. We found ourself in a very unusual situation. Some of the federal regulations didn't apply, others applied to different levels of appeal; and what we sought to do was to

bring some kind of a rational time standard to the case.

We asked for that before trial; we asked for that after trial; and only while it was on appeal to the First Circuit that the Department eventually decided to settle this case based upon the same time standards that Magistrate Barry had talked to them about, that I had talked to them about prior to trial.

Since the Court has read the rest of the brief, I would rely on the rest of the brief to show that our time, Judge, we didn't put in any of the time for the para-legal and law students that helped us do the survey around the State.

THE COURT: Let me ask, perhaps I can ask opposing counsel: Is there any, and of course I haven't made up my mind one way or the other, is there any issue, [15] as far as you're concerned, on the reasonableness of the bill and the time spent? Is that going to be an issue?

MR. BLACK: Your Honor, I was going to ask the Court for some time to address their brief. I received it yesterday afternoon and I really haven't had time to review it.

I tried. I did not have time between yesterday afternoon and this morning to look it over that carefully.

THE COURT: I think you misunderstood me. My question is: Is there any issue, because they've had their bills in there for some time, as to the length of time spent on this case and whether or not that bill is reasonable, two issues at the beginning?

MR. BLACK: I think I would like to address that question, Your Honor?

THE COURT: All right. Go ahead.

MR. BLACK: I think maybe I'll start out, if Brother Kelly is finished, with a brief history, also.

This case started sometime in 1976, and there were named plaintiffs. And our defense was that, if you go through any government system and pick and choose

your people, you are going to find some that are treated correctly and some that are treated broadly. And it was our opinion that we had been making determinations on time, with some [16] exceptions.

As I cited my brief, I cited Murphy's law: If anything can go wrong, it will. Now, to jump right to the one thing that the plaintiffs say, that they had to do a lot of discovery, well what they wanted at that time was to go into all the claimants' files and see if any of them met their criteria. And not only are those files confidential under the statute, but they are also in the legal section of the Department and we felt that that would be a violation of the statute for them to go through all the files.

THE COURT: Let me stop you here, and perhaps counsel can help the Court out.

I realize this is a class action, but you had 16 or 19 individuals.

MR. KELLY: Representatives of the class, Your Honor.

THE COURT: At this point, were they willing to waive any confidentiality on their particular records?

MR. KELLY: Yes. However, what we had to do was to, even though—almost all of them were our clients initially and they were from all over the State, and we had New Hampshire Legal Assistance retainers, we were required to do with new retainers, to look at their files again, and we wanted to look at the Department's files for the interoffice memos, which, if you look in the summaries of evidence, [17] are very telling about how the behind-the-scenes administrative process worked.

What our concern was there were a lot of other people who didn't come in to see us, who didn't know about the lawsuit, who, as Brother Smith testified, there were over 400 appeals a year. Anybody who lost benefits at the appeal tribunal and appealed to Superior Court was potentially a class member of ours, and those were the people we were trying to reach.

THE COURT: All right.

MR. KELLY: We had a lot of difficulty doing that.

MR. BLACK: Now, when Brother Kelly got the releases, Your Honor, he and I sat down. We went through every one of these files so we could look at them, and I'm the one that copied all the material and I set up the exhibits for the Court and I sent the copies down to Brother Kelly, and even up to a few weeks ago, a couple of weeks before Court, I'm the one that had the copies made of the files that they requested towards the end of the time. And they were sent up and given to the Court.

It was from those files, I believe, and of course Mr. Kelly's notes from before, that their summaries were developed. But the copying was done by the State in this case.

[18] I would like to also note, and I'm not exactly sure when, but during the pendency of this action, the federal regulations changed. Originally, all States were required to have—I believe 80 percent of their determinations, payable determinations processed within 14 days.

Now, the Federal Government, in it's infinite wisdom, after about five years of this, discovered that some States have waiting weeks and some States don't, and New Hampshire didn't. What they were doing was requiring New Hampshire to process claims within 14 days because it didn't have a waiting week, and the other States 21 days because they did have a waiting week. And the Department of Labor realized that really wasn't fair, that the same amount of work had to be done and payments had to be processed in the same manner, even though there was not a waiting list.

So, the time was extended to 21 days by the federal regulations sometime I believe in the middle of 1976, and I would have to check that, Your Honor.

Once Judge Bownes issued his decision, we started talking. And one thing in Judge Bownes' decision was the Department, he found we had acted in good faith.

He said nonetheless, he found there were delays but he found no bad faith in the treatment of these claimants. And I think that's quite important.

[19] Brother Kelly and I spoke one morning about the consent decree. And at that time it was my conclusion, or after speaking with him, that once we signed a consent decree, the attorneys' fees would not be asked for if we could get rid of the darn case.

I think it is a unique case. I think it was a case that really had very little impact anywhere along the line. There is a lot of work in this case. But as far as final impact, Your Honor, I think there is very little. The Department never has attempted to not make determinations on claimants, as this Court may know, and the Department has never been afraid to make decisions.

I think, perhaps, the Judge thoughts on whether or not it was an important case could be indicated by the fact it was not recorded.

THE COURT: Are you talking about the Federal Supplement?

MR. BLACK: In the Federal Supplement. As I was saying, it was my opinion everyone was going to work, so that the attorneys' fees would not be asked for once this case was settled because it was going to take a lot of work—

THE COURT: Let me ask you a direct question and this cuts right to the heart of this issue: Are you saying that you and Brother Kelly had an agreement that [20] there wouldn't be any motion for attorneys' fees?

MR. BLACK: I'm saying at that time, which I can't even remember the meeting, that Brother Kelly told me that, if we could work this out, that they would even waive attorneys' fees. And I thought—I was astounded at that point, Your Honor.

THE COURT: Did you work it out at that time, whatever point it was?

MR. BLACK: No, we did not, Your Honor. And that's where the problem begins.

We could not agree to that consent decree. I offered one and I don't remember—I don't have a copy of mine, and I may have done it, put forward a consent decree that said no costs, no fees.

Now, I don't think, if that included attorneys' fees, but part of the problem including the attorneys' fees and the consent decree was that, in a seminar that was held, it seemed to be the consensus of those present.

You would not hold a class action hostage or consent decree hostage for a waiver of attorneys' fees.

Now, I haven't seen anything lately on that, but it became my opinion, and I was warned by my brother counsel in the office, I should not be holding the consent action hostage to attorneys' fees because I might have an ethical problem and it should not be included in the [21] consent decree. That was his opinion. He had been through the course, and I took his opinion.

I would say, Your Honor, that by finally having a consent decree in this case, counsel on both sides would have saved a considerable amount of time. The plaintiffs got what they wanted, at least appeared to; the defendant got something that it wanted; and everyone seemed to be happy.

At that point, with an $18,000 bill facing my client, I regret recommending that he sign a consent decree. And in the future, I'll be much more careful in recommendations of consent decrees.

I think that's an important thing for this Court to consider, when a decree is finally entered and attorneys' fees are then asked for and the amount is actually more than my salary at that time, a couple of thousand dollars more than my salary for the year. And during that time, not too much less than what a Judge was making in the State of New Hampshire.

THE COURT: What Judge are you talking about?

MR. BLACK: Superior Court Judge, Your Honor, if I remember back in '75 before the pay raises.

THE COURT: We were making $37,000, if you want to know.

MR. KELLY: I'll take $37,000.

[22] MR. BLACK: I'm sorry, Your Honor, I thought it was very close to $23,074.75. I would add that would be woefully underpaid.

I would like an opportunity to respond to plaintiffs' memoranda, which I received yesterday.

THE COURT: How about Friday? I don't like to drag these matters out. They keep piling up on me, too. I'll give you until Friday. Today is the 21st.

MR. BLACK: I'm going to be out of the State. If it could be extended to Tuesday, I would appreciate it.

THE COURT: Do you have any objection?

MR. KELLY: No, Your Honor.

THE COURT: All right. August 28th. All right. But I don't want to accuse you of being evasive, regardless of responding to Brother Kelly's and Brother Cronheim's brief. Again, I'm asking you, I haven't gone through the file, but just looking at it, I know it's very voluminous, are you disputing the hourly request made by Brother Kelly and the time he spent in the case? That's what I'd like to know. That is a crucial issue.

I mean, you've had this motion for some time, haven't you?

MR. BLACK: Yes, I've had the motion, Your Honor. I regret I did not figure out how much it was. I received the motion June 7th, the motion for attorneys' fees, [23] but I did not add it up.

THE COURT: See, the problem there, if you would dispute it, that means coming back here again and getting into whether or not the bill is reasonable, and I thought that would be in issue, today. Either you're going to dispute it or you're going to agree to it?

MR. KELLY: Your Honor, may I say something at this point?

Normally, under the rules, the local rules, when there is a motion, if there is an objection in the motion or an objection to what's contained in the motion, there has to be a response within ten days.

I would argue, since the Department has had almost three months, on it's face the time must be taken as reasonable.

MR. BLACK: I seem to be missing one of the pleadings.

THE COURT: I have a copy here. Why don't we take about a ten minute break, 15 minute break; and if you want to refresh your recollection on that, go ahead.

(The Court was in recess from 9:45 o'clock a.m. to 10:00 o'clock a.m.)

MR. BLACK: As to the number of hours, I have no complaint.

THE COURT: How about the hourly charge by [24] Brother Cronheim and Brother Kelly?

MR. BLACK: Your Honor, I would disagree with that for a couple of reasons, some of which I already stated to the Court. The main one—

THE COURT: Maybe you have, I probably lost sight of it. You want to repeat it

MR. BLACK: Okay. First, Your Honor, this would be more than Brother Kelly's annual salary and more than mine at that time, and 334 hours, and a 40 hour week, work week, which I don't think any of us work, we mork more than that is what I mean, Your Honor, just to make the record clear, 40 hour work week, that's eight weeks roughly.

THE COURT: Well, is it your opinion this should be geared to the salary he makes, divided by the number of hours?

MR. BLACK: I think that should be considered, along with the Judge's finding that our defense was in good faith, along with the fact that an $18,000 bill in this case I think would have a chilling affect on any State agency that's ever brought into this Court, as far as attorneys' fees, as far as having a consent decree. And I worked on this case mostly alone, Your Honor, although I did have help occasionally. Besides this fact, I'd like to file the memorandum in answer to theirs and the Court has

allowed me to do so. I have nothing else to say, Your Honor.

[25] THE COURT: I don't know: Did you give me back that? Just so my records will be complete, maybe you did?

MR. BLACK: I think I did. It was received. Yes, I found it.

THE COURT: Did you want to respond, just limited to, Brother Kelly, the attorneys' fees, please?

MR. KELLY: Just briefly, Your Honor. Your Honor, as we pointed out in our memorandum, Nadeau say's the issue of good faith is not a consideration in the awarding of attorneys' fees.

There in the Nadeau case, there was a new prison administration, there was a new warden. They undertook, at least the State claimed, voluntarily a lot of the changes in the protective custody wing in the prison. The only clear issue on which the prisoners were winners was on the library, and the Court in that case awarded $10,000 just on the issue of a prison library. Judge Bownes found that the rate for Brother Shapiro, working for New Hampshire Legal Assistance at the time, was fifty dollars an hour.

I would point out case law that says, even though people who work for the Civil Liberties Union, et cetera, you don't pay them at the hourly rate, you pay them at the prevailing rate.

Brother Black talked about the problems of [26] settling a class case. I think he confuses the Common Fund Doctrine with a case here were we have a strict and specific statutory authority to attorneys' fees.

I was doing some research yesterday, Judge, and I found a case Prandini verses The National Tea Company, 585 Federal 2d 47.

THE COURT: Which Circuit is that?

MR. KELLY: Third Circuit and cited by the First Circuit with approval. And what that case says I think it shows our good faith here again, even when you're

litigating the issues of attorneys' fees, you're entitled to the time you spent on the attorneys' fees as attorneys' fees time, another words. We didn't bill for the brief in this case, Your Honor, and in Prandini, they talk about the distinction between when you settle a common-fund-type case verses a statutory-right-to-benefits case. Prandini was a Title Seven Section Discrimination Case.

That's all I have to say, Your Honor.

THE COURT: I'll give you until the 28th. Thank you.

(Hearing adjourned at 9:40 o'clock a.m.)

Court Reporter's Certificate (omitted in printing).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

#C 76-71

RICHARD H. WHITE, ET AL.

v.

N.H. DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

COURT'S RULING ON MOTION FOR ATTORNEYS' FEES—August 30, 1979

This motion is brought under 42 U.S.C. S1988. The section provides that.

> In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title . . . the Court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fees as part of the costs.

This case has a long history and the Court will not rehash in total the factual or chronological litany of events.

Briefly, the Attorneys for New Hampshire Legal Assistance saw the original plaintiff, Mr. White in 1975. Suit was initiated on his behalf in March, 1976. The case was heard before Judge Bownes and entailed a trial of two days. Subsequently, the case was appealed to the First Circuit. The delay in the appeal was due to the transcript not being ready for a period of six months. Upon checking the file, it is readily ascertainable that it is quite voluminous. There are over one hundred fifty entries. There was a great amount of discovery in this case and William Barry, Magistrate was present at many discovery proceedings and he attempted to have counsel cooperate in facilitating and expediting this case through discovery procedures.

Counsel for the plaintiffs had to check Superior Court records in all ten counties in order to prepare their case as it was the defendant's position that files were privileged and could not be disclosed to plaintiff's counsel. As an aside, there is an average of three hundred appeals from determinations of the defendant's department to the New Hampshire Superior Court.

The parties attempted to arrive at a Consent Decree and there was evidence at the outset that attorneys' fees and costs would be waived. These attempts proved nugatory and finally without any mention of attorneys' fees and costs a Consent Decree was filed and approved by Judge Devine on January 26, 1979.

At a hearing on August 21, 1979, defendant's counsel agreed that the time spent by plaintiff's counsel was accurate, but could not and did not agree as to the amount of legal fees requested in the sum of $18,554. Cross reference is made to itemized bill in interest of plaintiff's motion for attorneys' fees filed August 14, 1979, docket marking of 155.

Of this sum of money, Attorney Raymond J. Kelly is seeking to recover $15,303.25 and Attorney Alan J. Cronheim $3,250.75 reaching the heretofore mentioned total of $18,544.00.

Reference is also made to a memorandum dated June 20, 1979 from Chief Judge Frank Coffin. While this memorandum involves fee requests under 18 U.S.C. S30006A, it does state that the reasonableness of Attorneys' fees are to be decided by the District Court Judge. The reason the Court refers to this memo is that this particular Judge did not hear the case on its merits and is doing as well as he can by reviewing the file.

Reference is made to the case of *Torres* v. *Sachs*, 538 F.2d 10 at page 13. Here the principal was stated that.

> allowable fees and expenses may not be reduced because (the prevailing party's) was employed . . . . by a civil rights organization . . . . or because the Attorney does not exact a fee.

Reference is also made to the case of *Hoitt* v. *Vitek* 495 F.2d 219. This is a case from the First Circuit involving a suit against the Warden of the New Hampshire State Prison in violation of 42 U.S.Code S1983. The District Judge, Bownes, J. allowed fees to a private attorney, but denied fees to the New Hampshire Legal Assistance attorneys. At Page 221, there is strong dictum that if the plaintiffs had been represented solely by New Hampshire Legal Assistance, then their legal fees should have been granted. Quoting from said opinion at Page 221.

> If the sole representative of the plaintiffs below had been NHLA and the district judge had reasoned, as he did, that the suit merited award under the "private attorney general" theory, we would find it difficult to discern the advancement of any legitimate policy by the denial of attorneys' fees to NHLA. See generally Note, Awards of Attorneys' Fees to Legal Aid Offices, 87 Harv. L. Rev. 411 (1973).

Another issue raised by the defendants is that the Consent Decree does not make them "Prevailing Parties". In general parties may be considered to have prevailed when they vindicate rights through a Consent Judgment or without formally obtaining relief. See *Nadeau* v. *Helgemoe*, 581 F. 2d 275.

Defendant's counsel has called to the Court's attention a leading first circuit case on attorneys fees. *King* v. *Greenblatt* 560 F. 2d, 1024. This case involved an appeal from the award in attorneys' fees resulting from a successful civil rights suit to improve conditions of plaintiff's confinement at a treatment center for the sexually dangerous, 42 U.S.C.A. S1988.

Quoting from pages 1026, 1027 and 1028 the Court set forth the criteria to be used.

What constitutes a reasonable attorney's fee in a particular case shall rest within the sound discretion of the district court, see *Johnson* v. *Georgia Highway Express*,

Inc. 488 F.2d 714, 717 (5th Cir. 1974). We shall, however, expect a court to adhere carefully to certain general criteria in making a discretionary award under the Fees Act.

The Fifth Circuit's decision in *Johnson* v. *Georgia Highway Express, Inc.*, supra, was cited with approval in the legislative history of the Fees Act and in decisions of the Eighth, Ninth, and D.C. Circuits. Johnson listed twelve factors to be considered by district courts in arriving at reasonable fees awards: 1) the time and labor required; 2) the novelty and difficulty of the question presented; 3) the skill required to perform legal services; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee in the community; 6) whether the fee is fixed or contingent; 7) time limitations imposed by client or circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation and ability of the attorney; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; 12) awards in similar cases. Id. at 717-19. These criteria are similar to those in the ABA Code of Professional Responsibility and we approve them for use in Fees Act cases within this circuit with the following observations.

As a starting point, the attorney or attorneys must submit to the court a detailed record of the time spent on the case and the duties performed. See *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 682 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9 Cir. 1977). The court must secure from the attorneys a full and specific accounting for their time; bills which simply list a certain number of hours and lack such important specifics as dates and the nature of the work performed during the hour or hours in question should be refused. Furthermore, "an attorney's record of time is not a talisman", *Rainey* v. *Jackson State College*, 551 F.2d 672, 677 (5th Cir. 1977); the district court should scrutinize it with care.

> "The trial judge should weigh the hours claimed against his own knowledge, experience and expertise of the time required to complete similar activities. If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted. It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it." *Johnson* v. *Georgia Highway Express, Inc.*, supra, 488 F.2d at 717.

Once the time and labor required have been fully evalulated, the district court should apply the relevant Johnson criteria in arriving at a reasonable fee. In so doing, it would be helpful for the court to set out in the record the basis for the award and any pertinent findings of fact. See e.g., *Stanford Daily* v. *Zurcher*, *supra*. Care obviously should be taken to avoid excessive fees. The "normal" per hour rate in a locale is itself an artificial construct. Actual bills will frequently be lower, sometimes much lower, than that rate might indicate; on exceptional occasions they may however exceed it. While the modest Criminal Justice Act rates might allow a more mechanical application, an assumed market place rate is never to be applied across the board without regard to the difficulty of the work, the results achieved and all other relevant factors.

As stated before, this Court did not have the benefit of sitting as the Trial Judge, neither was the Court privy to conferences that the Magistrate participated in. First of all, the Court rules that the plaintiff is entitled to attorney's fees.

The second issue is whether the requested amount is reasonable as set forth in the criteria enunciated in *King* v. *Greenblatt*, supra. As stated the trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities. Further the court should set out in the record the basis for the award and any pertinent findings of fact.

At the outset, it is readily apparent that the file is voluminous.

It is subdivided into separate folders, entitled Motions, Pleadings, Orders, Depositions, Correspondence, Interrogatories and Memoranda. It is approximately three and a half inches in depth.

Docket entries as of today's date exceed 155 entries.

The issue was the finding of the District Court (Bownes J.) that there was an unlawful delay by the defendants in processing claims for unemployment compensation. This was on November 15, 1977 and December 15, 1977. As stated, an appeal was taken to the First Circuit Court of Appeals, there was a remand on defendant's motion and a Consent Decree filed in this Court.

Reference is made to plaintiff's itemized bill in support of plaintiff's motion for attorney's fees. (Docket Entry 155)

Attorney Raymond J. Kelly alleges that he spent 312.5 hours non-court time and 22.45 hours court time.

His associate, Alan J. Cronheim alleges that he spent 79.05 hours non-court time and 12.10 hours court time.

Attorney Kelly seeks compensation at the rate of $45.00 per hour for non-court time and $55.00 per hour for court time. Attorney Cronheim at the rate of $35.00 per hour non-court time and $40.00 per hour court time.

The Court does not intend, nor does it deem to be the dictate of *King* v. *Greenblatt* supra, to go through each pleading, every piece of correspondence, etc. to arrive at its ultimate conclusion of reasonable attorney's fees, but will allude to certain sections of the file. For ex-

ample, plaintiff's summaries of evidence, 359 pages of transcript from the trial, defendant's summary sheets, plaintiff's 28 page pretrial memorandum of law, Discovery in the case, numerous motions to dismiss, conferences of counsel, conferences and hearings with Barry, Magistrate, depositions of Roland L. Demers, Albin R. Lane and Rodney P. Anderson, court orders, interrogatories, affidavits in support of class actions and numerous objections by counsel.

It is also evident from the file that although the case eventually was settled by a consent decree, that it was bitterly contested from May 24, 1976 until today.

The Court does not question and defendant's counsel has not produced any evidence to contradict the hours spent on this case by Attorneys Kelly and Cronheim.

Plaintiff's counsel are very competent. The Court, in State cases, has had Attorney Kelly appear before him in particular on cases and Attorney Cronheim on occasion. Without reflection on counsel, but considering the length of time they have practiced law and using the Court's experience and the shibboleths of the New Hampshire Federal and State Bar Association criteria, work involved and results obtained, the Court awards reasonable attorney's fees as follows.

For hours spent by Attorney Kelly at the rate of $40.00 per hour for non-court time and $50.00 per hour for court time or a total of $13,636.07.

For hours spent by Attorney Cronheim at the rate of $30.00 per hour non-court time and $35.00 per hour for court time or a total of $2,998.33.

Reasonable attorney's fees in the sum of $16,644.40 are awarded to Plaintiff's counsel.

/s/ Martin F. Loughlin
MARTIN F. LOUGHLIN
U.S. District Judge

August 30, 1979

cc Michael M. Black, Esq.
Raymond J. Kelly, Esq.
Alan Cronheim, Esq.

THE STATE OF NEW HAMPSHIRE
U.S. DISTRICT COURT

September 1979

#C 76-71

RICHARD H. WHITE, ET AL.

v.

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF EMPLOYMENT SECURITY
BENJAMIN C. ADAMS, COMMISSIONER

MOTION TO VACATE CONSENT DECREE—
Filed September 13, 1979

NOW COMES The State of New Hampshire, Department of Employment Security, Benjamin C. Adams, Commissioner in the above entitled matter and respectfully requests that this honorable Court set aside the Consent Decree approved on January 26, 1979 for the following reasons:

1. This Court on August 30, 1979 awarded attorney's fees to Plaintiff's counsel in the amount of $16,644.40 to the Defendant.
2. When the Defendant signed the Consent Decree, there was no indication that $16,644.40 of the taxpayers' money would be awarded to Plaintiff's counsel.
3. The Defendant signed the Consent Decree in good faith.
4. The signing of the Consent Decree by the Defendant was done to save Defendant's counsel time and effort that could better be used for other purposes, as

Defendant's counsel is paid by the taxpayer. The signing of the Consent Decree should have resulted in a net saving of the taxpayer's money.

5. The Plaintiffs, by consenting to the Consent Decree, had obviously concluded that this Court's order might not withstand full appellate review.

6. Plaintiff's Motion for Attorney's Fees which was filed almost six months after the entry of the Consent Decree caught the Defendant by surprise, as prior to this time, Defendant had no notice that attorney's fees would be requested and certainly had no notice at all as to the amount of attorney's fees that would be requested.

WHEREFORE, The Defendant respectfully requests that:

1. The Consent Decree proved on January 26, 1979 be vacated, and;

2. This case be allowed to proceed on appeal with the Court of Appeals as if the Consent Decree had not been entered.

Respectfully submitted,

THE STATE OF NEW HAMSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY,
BENJAMIN C. ADAMS, COMMISSIONER
By his Attorneys:
Edward F. Smith
Michael M. Black

/s/ Michael M. Black
MICHAEL M. BLACK

September 12, 1979
Concord, New Hampshire

Certificate of service (omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFFS

v.

N.H. DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., DEFENDANTS

PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION TO VACATE CONSENT DECREE— Filed September 20, 1979

NOW COMES, the plaintiff and his class by their attorneys and objects to the Motion to Vacate the Consent Decree because:

1. This 42 U.S.C. § 1983 civil rights action was filed on behalf of unemployment compensation claimants over three years ago, seeking declaratory and injunctive relief under constitutional and federal statutory theories of recovery.

2. After eight pre-trial hearings, (*See* Plaintiffs' Memorandum of Law in Support of Attorney's Fees, pp. 14-15 N.4) and a two day court-trial, a decision was issued by the Court (Bownes, J.) granting plaintiff and his class substantial declaratory and injunctive relief to remedy unlawful delays in receiving unemployment compensation benefits.

3. A Motion to Stay the District Court's order was denied, (Bownes, J.) no stay was sought by the defendant's from the First Circuit, and an appeal was filed.

4. While the parties awaited the trial transcript, settlement negotiations were initiated by the plaintiffs' counsel.

5. Although initial settlement negotiations included discussions of each party possibly bearing their own fees and costs, "these attempts proved nugatory" *Court's Ruling on Motion for Attorneys' Fees*, P. 2 (August 30, 1979).

6. Further discussion on the consent decree and the issues of fees was held in plaintiffs' counsel's Portsmouth office on or about October 6, 1978.

7. On or about November 18, 1978, counsel for the Department received a copy of the slip opinion in *Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir., 1978) from plaintiffs which clearly indicated their intention on the issue of fees.

8. The Consent Decree was signed and approved by Chief Judge Devine on January 26, 1979 after the appeal to the First Circuit had been vacated and remanded at DES' request.

9. On January 31, 1979, plaintiff's counsel wrote DES' counsel on whether a discussion on fees pursuant to 42 U.S.C. § 1988 would be helpful.

10. Further correspondence by plaintiff's counsel to DES proved fruitless and a Motion for Fees was filed in June 1979 which the Department objected to.

11. After a hearing on August 22, 1979 before Judge Loughlin, at which time the defendant's admitted the reasonableness of plaintiff's counsel's hours spent on the case, a decision was issued on August 30, 1979 finding plaintiff's to be the prevailing parties under 42 U.S.C. § 1988, and awarding fees to plaintiff's counsel.

12. This Court found that plaintiffs did not waive their right to fees, had prevailed through the filing of a consent decree and litigated the issues thoroughly in a "bitterly contested" lawsuit so as to be entitled to fees under the standards enunciated by the First Circuit in *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977).

13. On September 12, 1979, DES filed a motion to vacate the Consent Decree, arguing surprise in the request for fees by the plaintiffs' attorneys.

14. As shown by the chronolgy of this litigation above, and the Court's opinion on the issue of fees, DES' arguments can only be characterized as frivolous indeed disingenuous.

15. In arguing against fees for plaintiffs counsel at the August 22nd hearing, the Department claimed New Hampshire Legal Assistance had waived its claim for fees. This was totally rejected by the Court.

16. Now the Department attempts to argue that it never knew about fees, and was in fact surprised by Mr. White's counsel's request. The facts of this lengthy litigation clearly refute that argument.

17. The only surprise the Department can honestly claim is to the final fee awarded, since they conceded the hours billed, but disputed only the hourly rate.

18. While Rule 60(b) of the Federal Rules of Civil Procedures does allow relief from final judgment in rare and compelling situations, "in general a party will not be granted relief from a consent judgment" 7 Moore's Fed. Practice. ¶ 60.19 at pp. 237-40. *See also Allingsmith* v. *Funke*, 421 F.2d 1350 (6th Cir. 1970).

19. The necessity of res judicata and finality of judgments can only be overcome by a "strong showing" by the Department why the consent decree should be vacated. *Goldberg* v. *Ross*, 300 F.2d 151 (1st Cir. 1962). No such showing has been made to this court.

20. If the Department disagrees with the Court's award of fees, the correct route is a direct appeal, a Rule 60(b) motion is not a proper substitute for an appeal. *Silk* v. *Sandoval*, 430 F.2d 1266 (1st Cir. 1971) *cert. den.* 402 US 1012 (1972).

21. This Court has already heard the Department's objections to fees. Its objection based on surprise has been denied, so no further delay in this three year old case should be tolerated, now that the dispute has been resolved and claimant's have the benefit of a more prompt review system when eligibility for benefits is in question.

22. Counsel have litigated this case in the District Court to an equitable conclusion that does not merit last minute tampering by the defendants.

23. Since the defendants claim of surprise on fees has already been rejected by this court, no grounds exist for the Court to even consider a Rule 60 (b) motion.

WHEREFORE, the plaintiffs' respectfully request that:

1. The Motion to Vacate the Consent Decree be denied,
2. The Court allow plaintiffs' their reasonable cost and fees in responding to this frivolous motion,
3. For such other relief as may be equitable and just.

Respectfully submitted,

RICHARD H. WHITE

By his Attorneys
NEW HAMPSHIRE LEGAL ASSISTANCE

by: /s/ Raymond J. Kelly
RAYMOND J. KELLY
88 Hanover Street
Manchester, New Hampshire

ALAN CRONHEIM
The Hill—Simeon Smith House
Portsmouth, New Hampshire

Certificate of service (omitted in printing)

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

C. 76-71-L

RICHARD H. WHITE, ET AL.

vs.

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL.

MOTION HEARING

Motion Hearing before the Honorable Martin F. Loughlin, United States District Judge, U.S. District Court, held at the United States Court House, Concord, New Hampshire on October 1, 1979, at 10:30 a.m.

APPEARANCES:

For the Plaintiff:

Raymond J. Kelly, Esq. and
Alan Cronheim, Esq.

For the Defendants:

Michael M. Black, Esq.

[2] (10:30 o'clock a.m.)

THE CLERK: This morning, the Court has for consideration a hearing on motion to vacate consent decree in Civil No. 76-71, Richard H. White, et al, verses New Hampshire Department of Employment Security, et al.

MR. BLACK: I'm going to be very brief. I think my motion is quite brief, also.

My client would like the Court to vacate the consent decree, based on the fact that he was surprised by, if not the request for the attorneys' fees, at least the amount of attorneys' fees.

My client feels that both sides gave up something, a probable loss or a probable win in the First Circuit, and by signing the consent decree, that since the Court has awarded attorneys' fees and since the award of attorneys' fees came some six months after or seven months after the date of the consent decree, he would like to go forward to the First Circuit and get a final review from the Court of Appeals.

I would add, Your Honor, again, I may be repeating myself from the last time we were here on the question of attorneys' fees, at the time I felt there was an ethical problem in discussion of the attorneys' fees, at least towards the end when the consent decree was finally signed, what I have read and what is being held is, if the [3] attorneys' fees are going to a nonprofit corporation, rather than to the plaintiffs, that it's wrong to hold the attorneys' fees hostage to consent decree because the Court's order goes to the plaintiff. And however the attorneys' fees go to the attorneys directly, and unlike other cases, if you hold or require an attorney in this situation to forego or withhold attorneys' fees in order for his clients to get what they wanted in the first place, from what I have read there is an ethical problem here. And that's all I want to say.

MR. KELLY: Your Honor, we filed an objection to the plaintiffs' motion to vacate the consent decree. Although they don't title it as such, it appears to be a Rule 60-b motion under the Federal Rules of Civil Procedure.

What they are attempting to do is to reopen the whole situation to allow them the opportunity to take an appeal on the merits.

I think the law is pretty clear in this area that there has to be very special and compelling circumstances for the Court, once a consent decree has been filed and approved by the District Court. And in fact in this case the consent decree was sent to the First Circuit, also. It had to be remanded before the appeal could be removed.

The law seems to be very clear, Your Honor, except in exceptional circumstances, which I don't think [4] occur here, consent decrees will not be allowed to be reopened. There hasn't been any change in the law; there hasn't been any change that would allow the Department to argue any kind of surprise.

I think, as our objection makes clear, the Department was aware of the issue of attorneys' fees. I think these issues have already been ruled upon by the Court when it issued it's decision on the attorneys' fees before.

There isn't any surprise. If there is surprise as to the amount of attorneys' fees awarded, the Department has done the proper thing. We received a notice of appeal, today; they appealed your decision to the First Circuit on the issue of attorneys' fees. If they have any problems with the amount that the Court awarded or the standards that were used, that is the proper place to go. Rule 60-b motion to try to reverse the consent decree is not proper. The Court has already ruled upon, you know, the grounds D.E.S. brings, today, for vacating the consent decree, and we feel there is no grounds, especially surprise, that exists here to allow the Court to reopen. We ask that the motion be denied.

THE COURT: Well, I think the only thing I'd like to say for the record is that I think I alluded to it before, perhaps, in awarding attorneys' fees, maybe I didn't, but we received a directive from the Chief Judge of the [5] First Circuit, stating that whenever attorneys' fees are awarded, that it's incumbent upon the Court to make a determination as to what reasonable fees are.

Of course, I fell heir to this file. The person best suited, fortunately or unfortunately, is a member of the Circuit Court, and I presume he won't sit on this case anyway. But I did the best I could from analyzing the file and going through it, which was quite voluminous. I thought I'd put that on the record.

I am aware that able counsel will bring that out, I suppose, when they argue before the First Circuit.

Anything else?

MR. BLACK: No, Your Honor.

(Hearing adjourned at 10:38 o'clock a.m.)

Court Reporter's Certificate (omitted in printing)

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

#76-71

RICHARD H. WHITE, ET AL.

v.

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF EMPLOYMENT SECURITY
BENJAMIN C. ADAMS, COMMISSIONER

ORDER ON MOTION TO VACATE
CONSENT DECREE

Motion denied.

So Ordered,

October 1, 1979

/s/ Martin F. Loughlin
MARTIN F. LOUGHLIN
U.S. District Judge

CC Michael M. Black, Esq.
Raymond J. Kelly, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1536

RICHARD H. WHITE, PLAINTIFF, APPELLEE

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., DEFENDANTS, APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. MARTIN F. LOUGHLIN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*
ALDRICH and CAMPBELL, *Circuit Judges*

Michael M. Black, with whom *Edward F. Smith* was on the brief, for appellant.

Raymond J. Kelly, with whom *Alan Cronheim* was on brief, for appellees.

August 12, 1980

CAMPBELL, *Circuit Judge*. New Hampshire Department of Employment Security (NHDES) appeals from the district court's allowance of plaintiff's post-judgment

request for attorney's fees and the court's denial of NHDES' subsequent motion to vacate a previously entered consent decree. As we find the fees request to have been filed too late, we reverse the award.

On March 8, 1976 the plaintiff, Richard M. White, commenced a class action in the United States District Court for the District of New Hampshire challenging NHDES' unemployment compensation procedures. White alleged that delays in the administration of New Hampshire's unemployment compensation program affecting certain groups of applicants worked a denial of due process and as well were violative of the so-called "when due" clause of the Social Security Act, 42 U.S.C. § 503 (a) (1).[1] The complaint alleged jurisdiction under 28 U.S.C. §§ 1343(3), (4) and 42 U.S.C. § 1983; requested class certification under Fed. R. Civ. P. 23; and sought declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202 and Fed. R. Civ. P. 57. The complaint did not include any request for attorney's fees.

Class certification was obtained on May 11, 1976, with the case proceeding to trial on October 12, 1977. The district court found that NHDES' scheme of administration did indeed violate the "when due" provision of the Social Security Act; the court ordered relief and judgment was entered November 15, 1977. Neither the court's opinion and order nor the judgment made any reference to a possible award of attorney's fees. The judgment was subsequently amended in respects not pertinent to the present appeal, and NHDES, on December 27, 1977, filed a timely notice of appeal.

While its appeal was pending in this court, NHDES requested and received numerous extensions of time for the filing of briefs and designation of an appendix on the ground that the parties were attempting to negotiate a settlement. Finally, on December 11, 1978, upon mo-

[1] The complaint also raised a pendent state claim alleging violations of R.S.A. 282:5-B(2)(d) which regulates certain aspects of New Hampshire unemployment compensation eligibility determination procedures.

tion of NHDES, this court ordered the "cause . . . remanded to the district court for the purpose of entertaining a consent decree." The consent decree was approved by the district court on January 26, 1979, with judgment entered on that day. Neither the consent decree nor the judgment contained mention of attorney's fees. The district court returned, after request, the appeal bond on February 28, 1979; the various exhibits apparently also were returned on or near that date.

On June 7, 1979, some four and one-half months after the district court's approval of the consent decree and its entry of judgment, plaintiffs moved for an award of attorneys' fees pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. NHDES objected to this motion contending: 1) that plaintiffs had, during the "original discussions . . . concerning settlement," indicated that attorney's fees would be waived;[2] 2) that plaintiffs had waited "too long to request attorney's fees . . .;" 3) that an award of fees would be counter-productive as it would penalize the state despite its good faith settlement efforts; and 4) that plaintiffs were not, under the terms of the consent decree, truly the "prevailing party."

A hearing on the fee request was held, and on August 30, 1979 the district court entered an order granting a fee award in an amount in excess of $16,000. Shortly thereafter, on September 13, 1979, NHDES, over objection, moved to vacate the consent decree contending that "Plaintiff's Motion for Attorney's Fees which was filed almost six months after the entry of the Consent

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[2] In the fees hearing before the district court, the parties presented different versions of talks they had had concerning attorney's fees prior to their approval of the consent decree which, as already mentioned, was silent on the subject. Plaintiffs contended that they had expected the fees issue to be resolved through negotiation following the entry of judgment while NHDES basically represented that it had expected that the issue of fees would not be pursued. The district court in its opinion awarding fees concluded that attempts to resolve the fees matter at the time of entry of the consent decree "proved nugatory."

Decree caught [NHDES] by surprise, as prior to this time, [NHDES] had no notice that attorney's fees would be requested and certainly had no notice at all as to the amount of attorney's fees that would be requested." The district court, after hearing, in a terse order of October 1, 1979, denied the motion to vacate. NHDES had previously filed on September 28, 1979 a notice of appeal of the district court's award of fees, and on October 30, 1979 it filed a similar notice concerning the court's adverse ruling on its motion to vacate. The appeals were consolidated by this court's order of November 6, 1979.

I.

We dispose of this appeal focusing solely on the question of the timeliness of plaintiff's motion for fees. As we set aside the award because the request was untimely, we do not consider NHDES' alternative contention that, in light of the unexpected award, it should be allowed to withdraw its consent and that the judgment entered pursuant to such consent should therefore be vacated. We hold that a fees award under 42 U.S.C. § 1988 is a matter to be raised and determined prior to entry of final judgment, and that, at the latest, a fees request may be presented after judgment only within such time limits as apply to an appropriate motion to reopen the judgment. Here the proper post-judgment motion was one to alter or amend judgment under Fed. R. Civ. P. 59(e); such a motion must, however, be served within 10 days after entry of judgment.[3] Since the present fees request was filed long after expiration of the 10 day period, and since Fed. R. Civ. P. 6(b) prohibits a court from extending the 10 day period, the lower court was without authority to entertain plaintiff's fees request.

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[3] Rule 59(e) provides in its entirety

"Motion to Alter or Amend a Judgment. A Motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Before proceeding to amplify these views we briefly consider plaintiff's threshold argument that since NHDES did not specifically raise the Rule 59(e) argument in the lower court, it is precluded from doing so now. *See Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979). The short answer to this objection is that Rule 6(b)'s proscription against the enlargement of the time for serving motions under Rule 59(e) is "mandatory and jurisdictional." *Lapiczak* v. *Zaist*, 451 F.2d 79, 80 (2d Cir. 1971); *see United States* v. *Robinson*, 361 U.S. 220, 229 (1960). Since we hold that a section 1988 fees motion must be made in time to be incorporated in the final judgment, the 10 day period prescribed by Rule 59(e) was in these circumstances the movant's last shot at achieving this result. The district court was thus without jurisdiction over the later application, and the matter of that lack of jurisdiction properly may be first raised at any stage of the proceedings, including the present appeal. *See, e.g.*, Fed. R. Civ. P. 12(b)(3).

II.

Coming to the merits of the timeliness question, our view of the procedural rules applicable to a section 1988 fees request is essentially that set out by Judge Warriner of the Eastern District of Virginia in a comprehensive opinion in *Hirschkop* v. *Snead*, 475 F. Supp. 59 (E.D. Va. 1979). Judge Warriner concluded that "the weight of authority favors the proposition that a motion for attorney's fees under § 1988 must be made within 10 days of entry of final judgment under Rule 59(e)." 475 F. Supp. at 62. The court, in the course of concluding that a final judgment had in fact been entered, rejected the argument that section 1988 fees should be treated as an item of costs governed by Fed. R. Civ. P. 54 and 58, which permit the taxing of costs, without express limit of time, after entry of judgment. The court also rejected the alternative argument that section 1988 fees were somehow so "collateral" to the main litigation as

to be eligible for treatment in isolation from the judgment therein.

When the present fees award was appealed, no circuit court had yet spoken on the timeliness issue considered in *Hirschkop*, although there existed a fair amount of circuit and district court authority on the timeliness of motions for attorney's fees made in contexts other than section 1988.[4] Most, though not all, of this authority

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[4] *E.g.*, *Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363 (E.D.N.Y. 1978) (in action for disability pension benefits, Fed. R. Civ. P. 59(e)'s ten-day time limitation bars successful plaintiff's request for attorney's fees filed more than 30 days after the entry of judgment) (aff'd on other grounds, although timeliness issue discussed without resolution, 589 F.2d 112 (2d Cir. 1978); *Stacy* v. *Williams*, 50 F.R.D. 52 (N.D. Miss. 1970) (Rule 59(e)'s ten-day limitation bars request for attorney's fees filed more than two months after entry of final judgment; court concluded that it was bound to apply Rule 59 as the fee request concerned "the granting of new substantive relief") (aff'd on the basis of Rule 59(e), 446 F.2d 1366 (5th Cir. 1971); *DuBuit* v. *Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976) (in patent case, "issue of attorney's fees should have been considered and disposed of either prior to or at the time of the entry of final judgment . . . and not left open pending the outcome of the appeal."); *Hill* v. *TVA*, 84 F.R.D. 226 (E.D. Tenn. 1979) (in action under Endangered Species Act, request for attorney's fees filed some 28 months after the entry of court's "final order" was barred by Rule 59(e)'s ten-day limitation or alternatively by Rule 60(b)'s one-year limitation on motions for relief from judgment); *Laufenberg, Inc.* v. *Goldblatt Bros.*, 187 F.2d 823 (7th Cir. 1951) (interpreting statute governing award of attorney's fees in patent infringement case to mean "that if an award . . . is to be made . . . the [trial] judge should do so either at the time of the entry of judgment or specifically reserve jurisdiction in such judgment to do so. . . ."). *Compare Lichtenstein* v. *Lichtenstein*, 55 F.R.D. 535 (E.D. Pa. 1972) (although acknowledging that Rule 59(e) would bar a motion to amend the judgment to include attorney's fees filed after the Rule's ten-day period had expired, the court instead termed plaintiff's request as one to amend the Bill of Costs and allowed it despite timeliness objection) (rev'd on other grounds, 481 F.2d 682 (3d Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974)). *See also* the so-called common fund cases discussed *infra*.

pointed in the direction taken by the district court in *Hirschkop*. The first decision by a circuit court discussing the timeliness of a section 1988 fees request was handed down soon after appellate argument in the present case; this was the Fifth Circuit's decision in *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980), holding, contrary to *Hirschkop*, that attorney's fees under section 1988 were "costs" within Fed. R. Civ. P. 54(b) and 58. As Rule 58 specifically provides that "Entry of judgment shall not be delayed for the taxing of costs," and neither Rule 54(b) nor 58 purports to prescribe any period after judgment within which costs applications must be filed, the Fifth Circuit, in the absence of any contrary local rule,[5] found no bar to entertaining a fees request filed some two months after the entry of final judgment. Were we to follow the decision in *Knighton*, the present fees request and award would thus likely be timely even though filed some months after entry of final judgment. With all respect, however, we disagree with *Knighton*.

We start from the premise that a final judgment ordinarily signifies the final resolution, subject to appeal, of all claims raised in a lawsuit. *See* Fed. R. Civ. P. 54. New claims may thereafter be advanced and old ones reinstated only pursuant to rules providing, within narrowly defined circumstances, for the reopening of the judgment. *See, e.g.*, Fed. R. Civ. P. 59, 60. If this were not so, appellate tribunals would be constantly vexed by multiple appeals growing out of fragments of the same litigation, and a party could never be sure when his case had ended.[6] It follows that a prevailing party's claim for

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[5] Although there is no local rule in the District of New Hampshire providing that motions for costs be filed within some specified time after entry of judgment, a number of district courts have adopted such rules. 10 Wright & Miller, Federal Practice and Procedure § 2679 at 240 n.76.

[6] Blackstone adds a bit of historical perspective to the practical considerations underlying the well-settled concept of finality of

attorney's fees under section 1988 must be resolved before or in the final judgment unless that claim be regarded as falling within some special exception carved out by rule or practice.

Plaintiff urges two such exceptions upon us in support of the view that their failure to request fees prior to the entry of judgment or to move within 10 days to amend such judgment so as to include a fee award, is not

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judgments. He tells how Edward I, "on his return from his French dominations in the seventeenth year of his reign" found it "necessary (or convenient, in order to replenish his exchequer)" to fine rather heavily various judges for "their corruption and other malpractices. . . ." Paramount among these bad habits was the practice of "erasing and altering records," a practice apparently engaged in by "almost all of the king's justices, even the most able and upright." And these punishments were often of a sizeable amount. Sir Ralph Hengham, Chief Justice of the King's Bench is said to have been fined some 7,000 marks, a rather tidy sum considering that the Chief's annual salary was then only 60 marks. The threat of such punishment was clearly not lost on the bench, for as Blackstone relates: "The severity of which proceedings seems to have alarmed the succeeding judges, that through a fear of being said to do wrong, they hesitated at doing what was right. As it was hazardous to alter a record duly made up, even from compassionate motives . . . they resolved not to touch a record any more; but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question: and, because Britton had forbidden all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. . . ." 8 Blackstone Commentaries, 409-410.

Thus from Edward's rather severe attempt to fill his coffers and the already traditional view of the solemnity of all judgments "came the ancient common law rule that a judgment, once enrolled on parchment, was unalterable even for the correction of a manifest mistake." *La Vale Plaza, Inc.* v. *R. S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967). Today, rules such as Fed. R. Civ. P. 54, 59 and 60 ease the situation somewhat, but the difficulties that would ensue were individual cases not to be organized around the principle of single and final judgment keep such escape valves the exception, not the rule.

fatal to their subsequent fee application. First plaintiff argues, as the Fifth Circuit held in *Knighton*, that section 1988 fees are properly treated as "costs," and thus specifically exempted from the requirement of resolution prior to the entry of final judgment.[7] This position is not without some support in the language of the Fees Act. The Act grants to the district court, in various specified actions, the discretion to "allow the prevailing party, other than the United States, a reasonable attorney's fee *as part of the costs.*" 42 U.S.C. § 1988 (emphasis added). Focusing upon this language, the Fifth Circuit concluded in *Knighton* that, "Because Congress directed that attorney's fees under section 1988 be treated as costs, there is no jurisdictional time limit on the filing of a motion seeking such fees." *Knighton* v. *Watkins*, 616 F.2d 795, 798 (5th Cir. 1980) (footnote omitted). We are unpersuaded, however, by this analysis.[8]

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[7] Notwithstanding plaintiff's reliance on the concept that attorney's fees are taxable as Rule 54 costs, plaintiff's motion for an award of attorney's fees was not made as part of a general application for costs; apparently, in fact, no such request for costs has yet been filed by plaintiff.

[8] Apart from the argument based on "costs," *see, infra*, the Fifth Circuit in *Knighton* pointed to little in support of its conclusion that motions for section 1988 fees may be filed after judgment has been entered and the 10 day period for amending or altering such judgment has expired. *See* Fed. R. Civ. P. 59(e). To say, as did that court, that a motion for fees does not change the judgment but merely seeks what is due because of the judgment is to beg the question to be decided. Nor are the cases cited by the Fifth Circuit in *Knighton* compelling. *National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991, 994-95 n.3 (D.D.C. 1974), discussed the timeliness of a request for fees in the context of the so-called common fund situation, a situation which has long been distinguished from cases like the present. *See infra.* And, *Environmental Defense Fund, Inc.* v. *Froehlke*, 368 F. Supp. 231, 251-55 (W.D. Mo. 1973), while providing thorough background information on the history of and procedure for the awarding of costs, did not discuss the question of attorney's fees generally, let alone the specific question of the timeliness of a request for such.

We do not find it clear that Congress, by generally describing attorney's fees under section 1988 as a part of the costs, meant thereby to include those fees within the specific type of costs recoverable after judgment under Fed. R. Civ. P. 54. Rule 54(d), referring to the awarding of costs, provides, in part, that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . Costs may be taxed by the clerk on one day's notice." 28 U.S.C. § 1920 adds a bit of flesh to the bones of Rule 54(d) by providing:

> "A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Examination of the above language strongly indicates that the costs allowed as of course by Rule 54(d) and detailed in 28 U.S.C. § 1920 are items of a nature very different from the discretionary attorney's fees allowed under the Fees Act. Rule 54(d) envisages the former as

capable of being taxed by the clerk on one day's notice. In keeping with this idea the costs listed in section 1920 are almost all capable of routine computation, and the one arguable exception, item (6), is peculiarly within the court's own authority to establish, without input from the parties and with little likelihood of engendering controversy. Not so the discretionary award of attorney's fees under section 1988. To calculate such an award, indeed, even to determine whether one should be made at all, the district court must evaluate possibly a dozen diverse factors, *see King* v. *Greenblatt*, 560 F.2d 1024, 1026 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), including such factors as the novelty and difficulty of the legal questions presented and the skill required to perform the particular services provided. Moreover, in determining the propriety and size of a fee award, the district court is generally assisted by submissions from the parties and frequently finds it necessary, as was true here, to hold a hearing on the matter. Appeals often ensue—leading to the prospect of separate fees appeals if final judgment rules are disregarded—as the sizeable sums involved may impose a very substantial and bitterly disputed liability upon the losing party. Hence while such fees, like routine costs, are, to be sure, somewhat ancillary to the main dispute, they are fully capable of engendering a major controverted claim which will be closely intertwined with the merits of the primary dispute and which will require careful factual and legal analysis by the court. The considerations making it feasible to treat routine costs as an exception to final judgment rules—the ease of their computation and the fact that they almost never give rise to dispute or appeal—plainly do not apply to section 1988 attorney's fees. Thus we do not believe that a section 1988 fees award can be likened to the costs assessed routinely after entry of judgment. The potential amount of the fees award, the varied factors which must be considered by the court in reaching the fees decision, and the crucial role of the

judge and parties in reaching that final determination render the fees/costs comparison strained at best.

True, as plaintiff points out, the Supreme Court itself, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), citing the language of the Fees Act, characterized attorney's fees under section 1988 as being a part of "costs." But this statement was made in the context of rejecting the contention that the eleventh amendment stood as a bar to the awarding of fees against a state. The Court's general reasoning and ultimate conclusion that "Costs have traditionally been awarded without regard for the state's Eleventh Amendment immunity," *id.* at 695, hardly seems dispositive of the question whether section 1988 attorney's fees fall within the specific types of taxable costs contemplated by Fed. R. Civ. P. 54(d) and 58. *Cf. Roadway Express, Inc.* v. *Piper*, 48 U.S.L.W. 4836 (June 23, 1980) (costs that federal courts may impose on lawyers who unreasonably and vexatiously extend court proceedings do not include attorneys' fees under section 1988).

Plaintiff advances a second and alternative argument in support of his position that the resolution of a section 1988 fee request should be treated differently from the general run of controverted issues resolved within the contours of a court's final judgment. He suggests that his "claim for attorney's fees is a collateral and independent claim," and thus not controlled by the time limits which relate solely to the entry of judgment in the central but supposedly separate claim on the merits. Plaintiff would have us view the fee matter as a separate mini-lawsuit to be commenced, argued and resolved at some point in time following the entry of judgment in the central litigation. While plaintiff argues that this position finds support in the cases, the cited decisions involved circumstances of a different sort than those presented here. As discussed by Judge Friendly in *Fase* v. *Seafarers Welfare & Pension Plan*, 589 F.2d 112, 114-15 n.3 (2d Cir. 1978), "cases where attorneys seek, long

after judgment, to be paid out of a fund created by the judgment, *Trustees* v. *Greenough*, 105 U.S. 527 (1882), *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885), or earmarked assets whose distribution would be governed by the legal principle which plaintiff's attorney had established, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939) . . . present a lesser problem than those where allowance of a fee will result in an addition to the amount awarded by judgment. Something may also turn on whether . . . the lawyer is asserting a right of his own . . . ; in the latter type of case it is easier to characterize the proceeding as 'collateral' or 'independent.'" Here we have neither the so-called common fund situation, *see also National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991 (D.D.C. 1974), *rev'd on other grounds*, 546 F.2d 1003 (D.C. Cir. 1976), *cert denied*, 431 U.S. 954 (1977), nor an attorney seeking fees by asserting a right of his own rather than one of his client. *See* 42 U.S.C. § 1988 (award of attorney's fees goes to "prevailing party," rather than attorney). *But cf. Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980).

Moreover, plaintiff's contention that a section 1988 fee request is an independent claim that can be maintained after judgment runs squarely counter to the language of the Fees Act itself, which provides that "*In any action or proceeding* to enforce [appropriate civil rights statutes]" the court may, in its discretion, allow reasonable attorney's fees to the prevailing party. (Emphasis added). This language strongly indicates that the fee issue is one properly viewed as belonging within the main body of the already commenced civil rights action.

We thus remain unpersuaded that a section 1988 fees request falls within some recognized exception—be it "costs" or a theory of independent claim—to the general rule requiring the resolution of controverted issues by a trial judge within the overall framework of the central litigation and the final judgment entered therein. Rather, our review of the relevant authority, *see, e.g.*, note 4, *supra*, including the Fees Act and the well-reasoned

Hirschkop decision previously discussed, persuades us that the timeliness of a post-judgment motion for attorney's fees made pursuant to section 1988 is properly governed by Rule 59(e)'s ten day limitation.[9] A request for a discretionary award of fees under section 1988 is intimately tied to the questions raised in, and overall merits of, the prevailing party's case, *see King* v. *Greenblatt*, 560 F.2d at 1026-27; it is a request, moreover, that may lead to a sizeable and unpredictable addition to the burdens shouldered by the losing party, *see, e.g.*, *Palmigiano* v. *Garrahy*, 616 F.2d 598 (1st Cir. 1980) (affirming fee award of $115,483.75); *Lamphere* v. *Brown University*, 610 F.2d 46 (1st Cir. 1979) (award well in excess of $200,000). The ultimate award of fees is, in our view, clearly a part of the overall relief sought and granted during the course of a particular civil rights action. Not only will it often be more economical of a court's time to resolve fees requests prior to entry of judgment rather than having them surface for the first time weeks or even months thereafter, but so doing ensures certainty as to the scope and finality of the judgment, *see Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363, 367 (E.D.N.Y. 1978), and at the same time reflects and re-enforces the strong policy against piecemeal appeals. *Wright* v. *Jackson*, 522 F.2d 955, 957 (4th Cir. 1975) (Aldrich, J.).

Indeed, the present case highlights many of the problems which would likely be frequently encountered were we not to endorse the position that Rule 59(e)'s ten day limitation marks, in terms of time, the outer limits of a fees request. The protraction here of a dispute previously, to all appearances, resolved is clearly not an occurrence to be encouraged. A court, having set its hand to the plow on the central litigation, should complete

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[9] We need not now address the question whether and in what circumstances the time limits established in other Rules permitting the opening of judgments might apply to a section 1988 fees request.

the furrow all at one time. The present post-judgment motion for an award, coming as it did nearly five months after judgment, was in our view too late.

We add that we see our decision as imposing no great hardship on civil rights litigants or courts. Doubtless persons such as the present litigants who have acted prior to this decision have greater cause for complaint than will those who follow them, but most fees litigants who have previously come to our attention have taken pains to request fees prior to or within ten days following entry of judgment, *see, e.g., Ben David* v. *Travisono*, No. 79-1186, slip op. at 6 n.2 (1st Cir. May 16, 1980); the state of the law has surely been such as to suggest the wisdom of that course.

Our decision will not prevent a district court from granting prompt and effective relief in a civil rights case. Entry of judgment which determines all matters except fees and includes an express reservation of the issue of fees, is a possible option when time is of the essence. Such a judgment might raise a question of finality should an appeal immediately be taken, *see Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980), but even if non-appealable because still interlocutory the judgment would otherwise be effective. And the district court has the means to ensure, when necessary, the appealability of such a judgment. Under Fed. R. Civ. P. 54(b) the court may direct the entry of final judgment forthwith upon fewer than all claims presented upon determining expressly that there is no just reason for delay. Thus under our present decision the district court retains ample flexibility. Our decision merely ensures that fees, like all other matters in controversy, will be covered by a unified judgment which, absent express action under Rule 54(b), controls the entire case.

Nor in a consent decree context do we see anything wrong with requiring the parties face up to the issue of fees in their settlement negotiations. *Cf. Regalado* v. *Johnson*, 79 F.R.D. 447 (N.D. Ill. 1978) (expressing

concern over the propriety of injecting the issue of fees into settlement negotiations). Failure to confront the fees issue merely muddies the waters, as the present case well demonstrates. We of course do not suggest that an attorney in the course of settlement negotiations need, or in every case properly may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree. If agreement as to fees is not easily accomplished, the parties may provide for submission of the entire question of fees to the court; further, they may, of course, decide to waive fees altogether. But there is nothing whatever to be encouraged in the path followed here—leaving the matter of fees unmentioned in the settlement and then raising it unilaterally several months later under circumstances that cast a shadow upon the settlement itself. Where Congress has spoken on the subject of fees, there can be no virtue in pretending the issue does not exist.

As plaintiff's fees claim was filed out of time, it should not have been entertained, and we hold the district court was without jurisdiction to make any award.

The fees award entered by the district court is vacated.

SUPREME COURT OF THE UNITED STATES

No. 80-5887

RICHARD H. WHITE, PETITIONER

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 18, 1981

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